



San Francisco Law Library

No.

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

MARY KALEIALII, REBECCA LEHIA MILES and ANNIE K.
BOYD, and ROBERT N. BOYD, and VICTOR K. BOYD, by
Their Guardian ad Litem, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and HENRY
HOLMES, Trustees Under the Will of JOHN J. SULLIVAN,
HENRIETTA SULLIVAN, JOHN BUCKLEY, PRISCILLA
ALBERTA SULLIVAN CLARKE and ROBERT KIRK-
WOOD CLARKE, a Minor, JUANITA ELLEN CLARKE, a
Minor, and THOMAS WALTERS CLARKE, a Minor,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

Filed

JUL 28 1916

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY KALEIALII, REBECCA LEHIA MILES and ANNIE K.
BOYD, and ROBERT N. BOYD, and VICTOR K. BOYD, by
Their Guardian ad Litem, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and HENRY
HOLMES, Trustees Under the Will of JOHN J. SULLIVAN,
HENRIETTA SULLIVAN, JOHN BUCKLEY, PRISCILLA
ALBERTA SULLIVAN CLARKE and ROBERT KIRK-
WOOD CLARKE, a Minor, JUANITA ELLEN CLARKE, a
Minor, and THOMAS WALTERS CLARKE, a Minor,
Defendants in Error.

Transcript of Record.

**Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.**

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit as to Amount Involved.....	156
Amended Complaint.....	1
Assignment of Error on Return to Writ of Error Returnable to U. S. Circuit Court of Appeals.....	154
Assignments of Error on Writ of Error Return- able to Supreme Court, Territory of Hawaii.	143
Certificate of Clerk to Transcript of Record and Return to Writ of Error.....	172
Citation on Writ of Error Returnable to U. S. Circuit Court of Appeals.....	166
Decision	31
Decision	63
Deed, June 22, 1850, Alexander Adams to Alex- ander Adams, Jr.....	75
Defendants' Answer and Plea.....	17
EXHIBITS:	
Exhibit "A," to Amended Complaint.....	6
Exhibit "A," Deed, Sept. 15, 1858, Alexan- der Adams, Jr., to Peke and Maria (in Hawaiian).....	6

Index.

Page

EXHIBITS—Continued:

Exhibit "A," Deed, September 15, 1858, Alexander Adams, Jr., to Peke and Maria.....	35
Exhibit "B," to Amended Complaint— Translation of Exhibit "A," Deed Sep- tember 15, 1858, Alexander Adams, Jr., to Peke and Maria.....	11
Exhibit "B," Translation of Exhibit "A"— Deed, September 15, 1858, Alexander Adams, Jr., to Peke and Maria.....	40
Exhibit "C"—Deed, December 1, 1868, Peke A. Stone to Maria A. Boyd.....	45
Exhibit "D"—Deed, October 21, 1885, Peke A. Stone to Maria A. Boyd.....	47
Judgment of Circuit Court, Territory of Hawaii.	64
Judgment, Supreme Court, Territory of Hawaii.	150
Minutes of Court—November 14, 1914.....	19
Minutes of Court—November 28, 1914.....	20
Minutes of Court—December 15, 1914.....	20
Minutes of Court—February 6, 1915.....	22
Minutes of Court—February 13, 1915.....	23
Minutes of Court—February 24, 1915.....	24
Minutes of Court—March 31, 1915.....	24
Minutes of Court—August 28, 1915.....	29
Minutes of Court—August 30, 1915.....	30
Minutes of Court—September 1, 1915.....	31
Minutes of Court—January 12, 1916.....	31
Minutes of Court—January 29, 1915.....	22
Notice of Decision on Reserved Question of Law	62
Opinion, of Circuit Court, Territory of Hawaii..	32

Index.	Page
Opinion of Supreme Court, Territory of Hawaii	51
Opinion of Supreme Court, Territory of Hawaii	148
Order Allowing Writ of Error and Supersedeas Returnable to U. S. Circuit Court of Ap- peals	158
Order Amending Complaint.....	20
Order Certifying Question of Law to Supreme Court, Territory of Hawaii.....	31
Order Continuing Hearing to February 24, 1915	24
Order Continuing Hearing to March 25, 1915..	24
Order Continuing Hearing of Cause to February 13, 1915	23
Order Continuing Hearing of Motion to Amend Complaint to December 5, 1914.....	20
Order Extending Time for Preparation and Transmission of Record.....	171
Order Setting Hearing of Cause for February 6, 1915	22
Order Setting Hearing of Motion to Amend Complaint, for November 28, 1914.....	19
Order to Amend Complaint.....	20
Petition for Writ of Error and Supersedeas Re- turnable to U. S. Circuit Court of Appeals..	151
Petition for Writ of Error Returnable to Su- preme Court, Territory of Hawaii.....	140
Pracipe for Transcript of Record.....	168
Reservation of Questions of Law for Considera- tion of the Supreme Court.....	33
Supersedeas and Cost-bond on Writ of Error Returnable to U. S. Circuit Court of Ap- peals	160

Index.	Page
TESTIMONY ON BEHALF OF PLAINTIFFS:	
BOYD, MRS. ROBERT N.....	89
KALEIALII, MARY	78
Cross-examination	85
Redirect Examination	88
Recross-examination.....	89
KING, ROBERT D.....	91
Cross-examination	101
KOPA, GEORGE C.....	74
PETERS, HENRY.....	71
TESTIMONY ON BEHALF OF DEFEND- ANTS:	
BOLTE, C.....	132
BUCKLEY, JOHN.....	134
Cross-examination	137
HOPKINS, C. K.....	131
KALEIALII, MARY.....	110
KOPA, GEORGE C.....	112
ROBERTSON, GEORGE H.	117
Cross-examination	129
Transcript	66
Translation of Exhibit "C," Deed, December 1, 1868, Peke A. Stone to Maria A. Boyd....	46
Translation of Exhibit "D," Deed, October 21, 1885, Peke A. Stone to Maria A. Boyd....	49
Writ of Error, Returnable to Supreme Court, Territory of Hawaii	146
Writ of Error to the Supreme Court for the Ter- ritory of Hawaii	163

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January, A. D. 1914, Term.

MARY KALEIALII, REBECCA LEHIA MILES,
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *Ad Litem*, JOSEPHINE BOYD,
Plaintiffs,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE, and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,
Defendants.

Amended Complaint.

ACTION TO QUIET TITLE.

Now come Mary Kaleialii, Rebecca Leah Miles and Annie K. Boyd, and Robert N. Boyd and Victor K. Boyd, by their guardian *ad litem*, Josephine Boyd, plaintiffs herein, and complaining of Henrietta Sullivan, John Buckley and Henry Holmes, Trustees under the will of John J. Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke, and Robert Kirkwood Clarke, a minor, Juanita Ellen Clarke, a minor, and Thomas Walters Clarke, a minor, defendants, all of Honolulu, City

and County of Honolulu, Territory of Hawaii, for cause of action allege:

That plaintiffs above named are entitled in fee simple absolute to a one-half undivided interest in all those certain lands and premises situated in the City and County of Honolulu, Territory of Hawaii, being a portion of L. C. A. 801 to Alexander Adams, and being a portion of the same premises conveyed by Alexander [1*] Adams, Sr., to Alexander Adams, Jr., by deed dated June 22d, 1850, and recorded in the office of the registry of conveyances in Liber 4, page 214, and bounded and described as follows:

Beginning at a point on the northeast side of Hotel Street $304^{\circ} 56'$ 137.6 feet from the east corner of Hotel and Union Streets, and running by true azimuths:

1. $224^{\circ} 10'$ 43.0 feet along remaining portion of
L. C. A. 801 to A. Adams,
2. $138^{\circ} 10'$ 45.9 feet do do do
3. $44^{\circ} 30'$ 53.7 feet to the new line of Hotel
Street.
4. $304^{\circ} 56'$ 46.7 feet along the northeast line of
Hotel Street to the point of
beginning.
Area 2220 square feet.

That said plaintiffs are entitled to the immediate use and possession of said undivided interest in and to the above-described land and premises from the death of Peke Stone, the mother of Mary Kaleialii,

*Page-number appearing at foot of page of original certified Record.

and the grandmother of the remaining plaintiffs, the said Peke Stone having died on the 5th day of July, 1914, she, the said Peke Stone, being one of the grantees named in a certain deed executed by Alexander Adams, Jr., to his daughters Peke and Maria, dated the 15th day of September, 1858, wherein and whereby the said Alexander Adams, Jr., conveyed to his said daughters Peke and Maria the lands and premises herein before described for the period of their lives with the remainder over in fee simple absolute to the children of the said Peke and Maria in the event that they, the said Peke and Maria have children who might survive them or either of them; that the person herein above named as Peke or Peke Stone is the mother of Mary Kaleialii, and the grandmother of the remaining plaintiffs herein, and is the same person named in the said deed of Alexander Adams, Jr., as Peke, said deed is recorded in the registry of conveyances in Liber 11, page 75, which said deed is in the Hawaiian language and is annexed hereto and [2] marked exhibit "A," a translation thereof in the English language is also annexed hereto and marked exhibit "B."

That the said defendants claim an estate or interest in said premises adversely to the said plaintiffs, and plaintiffs allege that said claim is without right, and that said defendants have no estate, title, right, interest, claim or demand whatsoever, in and to said property so claimed by plaintiffs.

That the said claim of the defendants has been and is, greatly vexatious, damaging and prejudicial to the plaintiffs in their enjoyment of the said prem-

ises and that defendants have taken possession of said premises, and are now in the possession thereof, and by reason thereof plaintiffs are prevented from and unable to have their share of said premises adjudicated by partition and are unable to lease or dispose of the same to advantage.

WHEREFORE, plaintiffs pray that the defendants may be cited to appear and answer this suit in the manner and as provided and required by law, and that they may be required to set forth the nature and extent of their claims, and that the same may be determined by this Court, and that said claims may be adjudged to be wholly without right, and that said defendants, their servants, agents and employees, may be forever barred from asserting any right or claim whatsoever, in or to the said premises, or any part thereof, or any interest therein adversely to the plaintiffs; that said plaintiffs may have judgment quieting their title to said property and declaring that they have fee simple title in and to the said property as claimed by them; that they may be awarded possession thereof and that they may have all necessary writs and orders for the complete execution of such judgment as the Court may render herein; and that plaintiffs may have their costs herein and such [3] other and further relief as may be proper in the premises.

Dated, Honolulu, T. H., December 16th, 1914.

(S) MARY KALEIALII.

(S) REBECCA LEHIA MILES.

(S) ANNIE K. BOYD.

(S) ROBERT N. BOYD.

(S) VICTOR K. BOYD.

By (S) JOSEPHINE BOYD,

Their Guardian Ad Litem.

(S) LORRIN ANDREWS,

Attorney for Plaintiffs.

Territory of Hawaii,

City and County of Honolulu,—ss.

Mary Kaleialii, being first duly sworn, upon her oath deposes and says:

That she is one of the plaintiffs named in the foregoing amended complaint; that she has read the said amended complaint and knows the contents thereof, and that all the matters and things therein stated are true to her knowledge.

(S) MARY KALEIALII.

Subscribed and sworn to before me the 16th day of December, 1914.

[Notarial Seal] (S) JAS. K. JARRETT,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [4]

Exhibit "A" to Amended Complaint.**ALEXANDER ADAMS, JR., DEED TO PEKE
AND MARIA.**

Sept. 15, 1858.

L. C. A. 5049, B, R. P. 1918-
2349-2530.

Book II, pp. 75.

Olomana, Kona, Oahu.

He palapala hoolilo loa i ka aina keia hanaia i keia la umikumamalima o September, M. H. o ka Haku hookahi tausani ewalu haneri a me kanalima kumamawalu, o Alexander Adams, Jr., no Honolulu ma ka mokupuni o Oahu, Ka mea nona ka aoao mua a me Peke a me Maria kana mau katikamahine no ia wahi pu no ma ka aoao elua.

Ke hoike nei o Alexander Adams, Jr., i oleloia maluna, a no Kona makemake iho e hoomakaukau i mea e pono ai no kana mau kaikamahine no Peke a me Maria, i mea e pale aku ai ina poino hiki wale mai, ano ka malama ana i ko laua mau kino ma na mea e pono ai, me ka hanai ana ia laua. A no ka mea o Alexander Adams, Jr., a mamuli o kona makemake iho i kana mau kaikamahine i oleloia maluna e pomaikai ana auanei laua i ka hua e loa^a mai ana, a i na hoolimalima, a i na keiki, a me na hope ame na ukuia mai no na waiwai paa i kakau ia a i hooakaakaia malalo iho nei o keia palapala a hiki aku i ka pau ana o ko laua ola a mau loa aku i ko laua mau hooilina me ka kuokoa i na kaohi ana me ke komo ole mai hoi o ka laua mau kane iloko o ia mau wahi oia hoi o ka laua mau kane i keia manawa, a e loa^a hou aku ana paha ma keia hope aku, ke ole

e hanaia kekahi palapala hoolilo i na kane a laua, Nolaila ano ke hoike aku nei keia palapala o Alexander Adams, Jr., i oleloia maluna, ano ka pono ona mea i oleloia maloko nei, ano na dala elua hoi i haawi ia mai iloko o kona lima e na mea nona ka aoao elua i oleloia maluna, a ua loaa io mai no ia mea hoike aku i ka hana ana, ka ai ana, haawi ana, hoolilo ana, hookuu ana, hooki ana a hoopau ana hoi, nolaila ma keia palapala ke hana nei, kuai lilo, haawi ana, hoolilo aku, hookuu ana, hookuuaku, a hoolilo loa ana aku i na mea nona ka aoao elua i oleloia maluna o kela mau apana aina a pau loa e waiho ana [5] ma Olomana iloko o Honolulu aina, a me ka pahale e waiho ana iloko o ke kulana kauhale o Honolulu e pili ana i ke alanui Hotele (Kuleana Helu 5049 B) o kekahi no Malule i kuai ia mai ma ka la ekolu o Augate, 1854, palapala sila nui helu 1918 i kakau inoa ia ma ka la 11 o Aperila, 1855, a me ka palapala sila nui helu 2349 ame 2530 i kakau inoa ia ma ka la 8 o Aperila, 1857, a me ka la 14 o September, 1858, a me ka pahale i haawiiia mai ma ke ano Alodio o Alexander Adams i kakau ia ma ka la 22 o June, 1850, a i hooiaioia e A. Bates ma ka la 22 o Augate, 1850, a penei na palena oia mau Apana aina.

4 loi ma Olomana (Kuleana Helu 5049 B a Sila Nui Helu 1918, e hoomaka ana ma ke kihi Akau o keia aina ae ana aku Hema 33° Hik 206 pauk me kaholo a Hema 49° Kom 195 pauk me aupuni Akau 29° Kom 277 pauk me aupuni no ke kula.

Akau 35½ hik 31 pauk me kaholo akau 61° hik 66
pauk me ka-
holo.

Hema 59° hik 45 pauk me kaholo.

Akau 61° “ 66 “ “ “

Hema 59° “ 45 “ “ “

Akau 70° “ 64 “ “ “ a hiki i ka hoomaka ana eia ka Ili 47/100 o ka eka.

2 loi (Sila nui helu 2349) E hoomaka keana ma ke kihi hema o keia a e holo Akau 54° Hik 189 pauk aoao ma kahawai alaila Akau 37° kom 125 pauk ma ke ka aupuni alaila Hema 49° kom 50 pauk a me ka.

Akau 29° kom 283 pauk pili me Keoki, alaila.

Hema 60° 50' kom 44 pauku a me.

Hema 55° 0' kom 133 “ me kahole aleila.

Hema 32° 0' Hik 342 “ a me.

Hema 47° 0' Hik 73 “ ma ka aina o Paia a i ka hoomaka ana he 46/100 o ka eka.

4 loi ma ka kula (sila nui helu 2530) e hoomaka ana i ka ana ma ke kihi komohana makai o keia ma ka aoao komohana Akau o ke kahawai e pili ana i ko Hapunako a me ko Paia a holo.

Hema 46° Hik 765 pauk ma ko Paia a

Akau 39° 30' Hik 285 pauk ma ko Auwaiolimu

Akau 23° 30' Kom 670 pauk ma kalokohonu a ma kela aoao o ke kahawai

Hema 68° 30' kom 62 pauk ma ke Papamakua

Akau 34° 0' “ 87 “ “ “ “

Hema 54° 30' “ 140 “ “ “ “ [6]

Hema 30° 30' hik 75 pauk ma ko Kaholo

Hema 60° 30' kom 46 “ “ “ “

Akau	36° 30	“	141	“	“	“	“
Hema	47° 30'	“	140	“	“	“	Napunako
Hema	36° 0'	hik	124	“	“	“	“
Hema	55° 30'	kom	191	“	“	“	“

a hiki i kahi i hoomaka
ai he 3-18/100 eka.

Pahale e pili ana i ke alanui Hotele iloko o ke kulana-
kauhale o kuleanaia ma ka inoa o Alexander Adams
i hoolilo loa ia mai ka la 22 o June, 1850, a i kopeia
ma ka Buke Aupuni ma ke keena kakau kope i
kopeia ma ka Buke 4 a me ka aoao 214 o ka la 22 o
Augate, 1850.

Commencing at John Duke's house along the
street southeast by E. $\frac{1}{2}$ E. 46 feet 6 inches, thence
NE. $\frac{1}{2}$ N. 62 feet thence NW. by W. 44 feet thence
SW. $\frac{1}{2}$ W. 72 feet to the place of commencement.
E lilo pu nohoi na mea maluna iho na hale a me na
mea e pili mai ana o na pono a me na pomaikai a me
na loa a pau loa mai ana ma ke Kanawai a me ke
Kaulike ma ua mau aina la ma na aoao a pau, a oia
mau mea a pau a me na waiwai a me na pono e pili ana
i ka aoao mua, e lilo ia no Peke a me Maria a me ko
laua mau pani hakahaka a me na hooilina a ina hope
no ka manawa pau ole.

A o Alexander Adams, Jr., i oleloia maluna a hiki
i ka make ana o kana mau kaikamahine alaila e
waiho aku laua i keia aina a me na pono e pili ana
i ka laua mau mea e kauoha aku ai, ke hanaia me ka
oiaio a me ka pololei, aka, ina e hana ole ia elike
me ka olelo maluna, ka hoolilo ana a me ka hooiaio
ana, alaila, e hoihoi ia no keia mau aina a me na mea
a pau e pili ana ia Alexander Adams, Jr., ka aoao

mua a i kona mau hooilina a no lakou wale no na pomaikai ke ole he mau keiki a ka aoao elua, aka, ina he mau keiki ka na mea nona ka aoao elua e ili aku no no pono a pau e like me ka pili ana i na makua.

Eia kekahi ina e make kekahi o na mea ma ka aoao elua aole ana keiki e ola ana ia wa, e ili aku kona pono a pau i oleloia maluna o ka mea o laua e ola ana. [7]

A ma keia palapala o na mea nona ka aoao elua i oleloia maluna ke hoike aku nei me ka hoohiki ana a me ke apono ana aku i na mea a pau iloko o keia palapala a ke hoopaa nei a ke ae pu nei me ka mea nona ka aoao mua i oleloia maluna a manaoio ae hooiaio aku, ae hoopaa a hooko i ka oiaio o keia palapala a ine na ano a pau i oleloia maloko nei; I hoike no keia ke kakau nei wau me kuu lima a me ka sila i keia la a me ka makahiki i oleloia maluna.

(Sgd.) ALEXANDER ADAMS, Jr.

Hania a kakau inoa ia a Silaia a haawiia ma ka ike maka o.

(Sgd.) J. L. NAILIILII.

“ KAAIAHUA.

Register Office, Oahu, Sept. 15th, A. D. 1858, personally appeared before me Alexander Adams, Jr., and acknowledged that he had executed the foregoing instrument for the uses and purposes therein set forth.

(Sgd.) THOMAS BROWN,

Deputy Registrar of Conveyances.

Received and compiled the 15th day of September, A. D. 1858, at $\frac{3}{4}$ past 2 o'clock P. M.

(Sgd.) THOMAS BROWN,

Deputy Registrar of Conveyances. [8]

**Exhibit "B" to Amended Complaint—Translation
of Exhibit "A," Deed, September 15, 1858,
Alexander Adams, Jr., to Peke and Maria.**

This deed is an absolute conveyance of land made this 15th day of September in the year of our Lord One Thousand Eight Hundred and Fifty-eight between Alexander Adams, Jr., of Honolulu, Island of Oahu, the party of the first part, and Peke and Maria, his daughters of the same place of the second part.

WITNESSETH: That the above-named Alexander Adams, Jr., of his own volition, in order to provide for his daughters, Peke and Maria, so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance. And whereas, the said Alexander Adams, Jr., because of his own desire for the afore-said daughters that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter, providing no conveyance is made to their husbands.

Now, therefore, this deed sheweth that the above-mentioned Alexander Adams, Jr., in consideration of the statements herein made and of two dollars paid into his hands by the parties of the above-mentioned second part which has been received in wit-

ness of the making, sale, giving, conveying, releasing, effectuating and confirming, therefore, by this deed, do make, sell, give, convey, release, effectuate and forever quitclaim to the parties of the second part hereinabove mentioned all those certain pieces of land situated at Olomana Honolulu, and the house lot situated in the town of Honolulu, along Hotel street (L. C. A. 5049B) to Keoki no Malule; deeded to me on the 3d day of August, 1854, Royal Patent 1918, acknowledged on the 11th day of April, 1855, and also Grant 2349 and 2530 signed on the 8th of April, 1857, and the 14th day of September, 1858, and the house lot sold to me by deed from [9] Alexander Adams, signed on the 22d day of June, 1850, and acknowledged by A. Bates on the 22d day of August, 1850, the descriptions of which are as follows:

4 Taro patches in Olomana (L. C. A. 5049B R. P. 1918) Commencing at the north corner of this land and surveyed as follows:

South 33° E 206 Links along Kaholo

South 49° W 198 Links along Government

North 29° W 277 Links along Government dry land

North 35½° E 31 Links along Kaholo

North 61° E 66 Links along Kaholo

South 59° E 45 Links along Kaholo

North 61° E 66 Links along Kaholo

South 59° E 45 Links along Kaholo

North 70° E 64 Links along Kaholo to the place
of commencement. The area
is 47/100 acres.

2 Taro patches (Grant 2349). Commencing at the

south corner of this and running north 53° E along the stream 189 links thence

North 37° W 125 Links along Government, thence

South 49° W 50 Links thence

North 29° W 283 Links along Keoki, thence

South $60^{\circ} 50'$ W 44 Links, thence

South $55^{\circ} 0'$ W 113 Links along Kaholo, thence

South $32^{\circ} 0'$ W 342 Links thence

South $47^{\circ} 0'$ E 73 Links along land of Paia to the point of beginning containing 46/100 acres.

4 Taro patches and dry land (Grant 2530). Commencing at the west corner makai of this land at the northwest corner of stream along the land of Napunako and Paia and running:

South 46° E 765 Links along Paia, thence

North $39^{\circ} 30'$ E 285 Links along Auwaiolimu,

North $23^{\circ} 30'$ W 670 Links along Kalokohonu to the opposite side of stream.

South $68^{\circ} 30'$ W 62 Links along Papamakua

North $34^{\circ} 0'$ W 87 Links along Papamakua

South $54^{\circ} 30'$ W 140 Links along Papamakua

South $30^{\circ} 30'$ E 75 Links along Kaholo

South $30^{\circ} 30'$ W 46 Links along Kaholo

North $36^{\circ} 30'$ W 141 Links along Kaholo

South $47^{\circ} 30'$ W 140 Links along Napunako

South $36^{\circ} 0'$ E 124 Links along Napunako

South $55^{\circ} 30'$ E 191 Links along Napunako to the place of commencement containing 3-18/100 acres.

House lot along Hotel Street in the City of Honolulu, the land commission of which is issued to Alex-

ander Adams, which was sold to me on the 22d day of June, 1850, copied in Government Registry of Conveyances, Buke 4, page 214, on the 22d day of [10] August, 1850.

Commencing at John Dukes house along the street southeast by east $\frac{1}{2}$ E. 46.6 feet, thence NE. $\frac{1}{2}$ N. 62 feet, thence NW. by W. 44 feet, thence SW. $\frac{1}{2}$, W. 72 feet to the place of commencement.

To have together with the things thereupon the houses and appurtenances, rights, and privileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interests and rights appertaining to the party of the first part (shall belong to Peke and Maria and to their representatives and heirs and assigns forever.

And the above-mentioned Alexander Adams, Jr., and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may demise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr. of the first part and to his heirs and the benefits shall only be theirs, providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner as enjoyed by their parents.

Provided that if one of the parties of the second part should die without any issue living at the time,

all the rights above-mentioned shall descend to the survivor of them.

The parties of the second part hereinabove set forth do hereby witness under oath and by affirmation as well as to all the contents of this deed and do hereby bind and both consent to and with the party of the first part hereinabove mentioned to ratify and certify and to bond and execute to the truth of this deed as well as to all the conditions herein mentioned.

In witness whereof I hereby sign with my hand and seal [11] this day and the year first above written.

(Sgd.) ALEXANDER ADAMS, Jr.

Made, signed and sealed in the presence of

(Sgd.) J. L. MAILILII,

(Sgd.) KAAIAHUA.

Register Office, Oahu, September 15th, 1858, personally appeared before me Alexander Adams, Jr., and acknowledged that he executed the foregoing instrument for the uses and purposes therein set forth.

(Sgd.) THOMAS BROWN,

Deputy Registrar of Conveyances.

Received and compiled the 15th day of September, A. D. 1858, at $\frac{3}{4}$ past two o'clock, P. M.

(Sgd.) THOMAS BROWN,

Deputy Registrar of Conveyances.

[Endorsed]: L. No. 8032. Reg. 4, pg. 498. Circuit Court First Circuit, Territory of Hawaii. Mary Kaleialii et al., Plaintiffs, vs. Henrietta Sullivan et

al., Defendants. Amended Complaint. Filed December 17, 1914, at 05 minutes past 9 o'clock, A. M. (Sgd.) J. A. Dominis, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Plaintiffs.

Due service of the within Amended Complaint by receipt of a copy thereof is hereby admitted this 17th day of December, 1914.

FREAR, PROSSER, ANDERSON & MARX,

Per A. M. C.,

Attorneys for Certain Defendants.

Due service of the within Amended Complaint by receipt of a copy thereof is hereby admitted this 17th day of December, 1914.

HOLMES, STANLEY & OLSON,

Attorneys for Certain Defendants. [12]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January, 1914, Term.

LAW No. 8032.

MARY KALEIALII, REBECCA LEHIA MILES,
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by their
Guardian *Ad Litem*, JOSEPHINE BOYD,
Plaintiffs,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and
HENRY HOLMES, Trustees under the Will
of JOHN J. SULLIVAN, HENRIETTA
SULLIVAN, JOHN BUCKLEY, PRIS-

CILLA ALBERTA SULLIVAN CLARKE,
and ROBERT KIRKWOOD CLARKE, a
Minor, JUANITA ELLEN CLARKE, a
Minor and THOMAS WALTERS CLARKE,
a Minor,

Defendants.

Defendants' Answer and Plea.

ACTION TO QUIET TITLE.

Come now the above-named defendants, and answering unto the complaint of the above-named plaintiffs in the above-entitled cause, deny each and every allegation in said complaint set forth and contained.

The said defendants further given notice hereby that they intended to rely upon the statute of limitations as a defense in said cause, and say that they and their predecessors in title have been in open, notorious, exclusive, continuous and hostile possession of the premises described in the said complaint adversely to the said plaintiffs, and under a claim of right for a period of more than ten years preceding the date of the filing of the said complaint, and that thereby the plaintiffs' cause of action, if any, has been barred by the statute of limitations.

Dated, Honolulu, T. H.

HENRIETTA SULLIVAN,
JOHN BUCKLEY and
HENRY HOLMES,

Trustees under the Will of John J. Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke, and Robert Kirkwood Clarke, a Minor, Juanita Ellen Clarke, a Minor, and Thomas Walters Clarke, a Minor, and Priscilla Alberta Sullivan Clarke, Guardian *Ad Litem* of said Minors.

By FREAR, PROSSER, ANDERSON &
MARX,

M. F. P.,
HOLMES, STANLEY & OLSON,
Their Attorneys.

Service of the foregoing answer and plea this 29th day of December, 1914, is hereby admitted.

LORRIN ANDREWS,
Attorney for the Plaintiff.

[Endorsed]: L. No. 8032. Reg. 4, pg. 498. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January, 1914, Term. Mary Kaleialii et al., Plaintiffs, vs. Henrietta Sullivan, et al., Defendants. Answer and Plea. Frear, Prosser, Anderson & Marx, Stangenwald Bldg., Honolulu, and Holmes, Stanley & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Defendants. Filed at 1:15 o'clock, A. M., December 29, 1914. J. A. Dominis, Clerk. [14]

Minutes of Court—November 14, 1914.

Saturday, November 14, A. D. 1914.

L. 8032.

ROBERT N. BOYD and MARY KALEIALII,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees under the
Will of JOHN J. SULLIVAN, HENRIETTA
SULLIVAN, JOHN BUCKLEY, PRIS-
CILLA ALBERTA CLARKE, and ROBERT
KIRKLAND CLARKE, a Minor, JUANITA
ELLEN CLARKE, a Minor, and THOMAS
WALTERS CLARKE, a Minor.

ACTION TO QUIET TITLE.

Came on to be heard this day, plaintiff's motion to amend complaint by striking from said complaint as a party plaintiff the name of Robert N. Boyd and inserting in his place and stead his heirs at law, to wit: Rebecca Lehia Miles, and Annie K. Boyd, in their proper person, and Robert K. Boyd and Victor K. Boyd, by a guardian *ad litem* to be appointed by the Court, and that an amended complaint alleging the death of Robert N. Boyd and the claims of heirs at law be filed within ten days after the granting of this motion; Lorrin Andrews, Esq., appears as attorney for plaintiff, and Claerence H. Olson, Esq., of the firm of Holmes, Stanley & Olson, appears as attorney for defendant.

By consent of counsel and order of the Court, hearing of the motion is set for Saturday, November 28,

A. D. 1914, at the hour of 9:00 o'clock in the forenoon of said day. [15]

Minutes of Court—November 28, 1914.

Saturday, November 28, A. D. 1914.

L. 8032.

ROBERT N. BOYD, et al.

vs.

HENRIETTA SULLIVAN et al.

ACTION TO QUIET TITLE.

Upon motion of Lorrin Andrews, Esq., attorney for plaintiffs, hearing of plaintiffs' motion to amend the complaint in the above-entitled cause, set for 9:00 o'clock A. M. this day, is continued until and set for Saturday, December 5, A. D. 1914, at the hour of 9:00 o'clock in the forenoon of said day.

Minutes of Court—December 15, 1914.

Tuesday, December 15, A. D. 1914.

L. 8032.

R. N. BOYD et al.,

vs.

HENRIETTA SULLIVAN, et al.

Order to Amend Complaint.

ACTION TO QUIET TITLE.

A motion having been made in the above-entitled matter suggesting the death of Robert N. Boyd, one of the plaintiffs herein, and it appearing from said motion and suggestion of death that the said Robert N. Boyd had died since the commencement of said action, leaving as his heirs, Rebecca

Lehia Miles, Annie K. Boyd, Robert K. Boyd and Victor K. Boyd, all of whom are of age except Robert K. Boyd and Victor K. Boyd, respectively eighteen and sixteen years of age; and it further appearing that said Robert N. Boyd died intestate and that it is necessary that a guardian *ad litem* be appointed to represent the minor children of said Robert N. Boyd.

Now, this matter coming on to be heard before me on the 15th day of December, 1914, and Lorrin Andrews appearing in behalf [16] of the motion and Holmes, Stanley & Olson, representing the defendants herein and consenting thereto, it is ORDERED that the said complaint in the above-entitled action be amended by striking from the said complaint as a party plaintiff the name of Robert N. Boyd and inserting in his place his heirs at law, to wit, Rebecca Leah Miles and Annie K. Boyd, in their proper persons, and Robert K. Boyd and Victor K. Boyd by their guardian *ad litem*, and that an amended complaint alleging the death of Robert N. Boyd and the claims of his heirs at law to the property in dispute be filed within ten days after the granting of said motion.

And it is further ordered that Josephine Boyd be appointed guardian *ad litem* for Robert K. Boyd and Victor K. Boyd, minors, herein.

And it is further ordered that the defendants have, and each of them has, fifteen days within which to answer, demur or otherwise plead to the amended complaint herein.

Dated, Honolulu, T. H., December 15, 1914.

(S) T. B. STUART,

Judge Circuit Court, First Judicial Circuit, Territory of Hawaii.

Minutes of Court—January 29, 1915.

Friday, January 29, A. D. 1915.

L. 8032.

R. N. BOYD et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et als.,

Defendants.

ACTION TO QUIET TITLE.

Came on to be heard this day the above-entitled cause, Lorrin Andrews, Esq., appearing as attorney for the plaintiff, and C. H. Olson, Esq., for the defendants.

By agreement of attorneys and order of the Court, this cause is continued and set for trial, jury waived, for Saturday, [17] February 6, 1915, at the hour of 10 o'clock in the forenoon of said day.

Minutes of Court—February 6, 1915.

Saturday, February 6, A. D. 1915.

L. 8032.

R. N. BOYD et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et als.,

Defendants.

ACTION TO QUIET TITLE.

Owing to the illness of two attorneys representing for or on behalf of the defendants in the above-entitled cause, upon motion of R. B. Anderson, Esq., of the firm of Frear, Prosser, Anderson & Marx, with the consent of Lorrin Andrews, Esq., appearing as attorney for the plaintiffs, is further continued and set down for trial, jury waived, for Saturday, February 13, 1915, at the hour of 10 o'clock in the forenoon of said day.

Upon motion of Lorrin Andrews, Esq., Frank Andrade, Esq., and attorney, was duly entered as attorney of record in the above cause.

Minutes of Court—February 13, 1915.

Saturday, February 13, A. D. 1915.

L. 8032.

R. N. BOYD et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et als.,

Defendants.

ACTION TO QUIET TITLE.

The above-entitled cause having been continued and set for trial for 10 o'clock A. M. this day, Lorrin Andrews, Esq., appearing as attorney for the plaintiff; and W. L. Stanley, Esq., and C. H. Olson, Esq., of the firm of Holmes, Stanley & Olson, and M. F. Prosser, Esq., of the firm of Frear, Prosser, Anderson & Marx, appeared as attorneys for the defendants.

By agreement of attorneys the above cause is con-

tinued and reset for trial for Wednesday, February 24, 1915, at the hour [18] 10 o'clock in the forenoon of said day.

Minutes of Court—February 24, 1915.

Wednesday, February 24, A. D. 1915.

L. 8032.

R. N. BOYD et al.,

Plaintiffs,

vs.

H. SULLIVAN et als.,

Defendants.

ACTION TO QUIET TITLE.

The above cause, jury waived, having been set for trial at 10 o'clock A. M. this day, W. L. Stanley, Esq., of the firm of Holmes, Stanley & Olson, appearing as attorney for the defendants, moved that this cause be continued and set down for trial for Thursday, March 25, 1915, at 10 o'clock in the forenoon of said day. It is so ordered by the Court.

Minutes of Court—March 31, 1915.

Wednesday, March 31, A. D. 1915.

L. 8032.

R. N. BOYD et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et als.,

Defendants.

ACTION TO QUIET TITLE.

The above-entitled cause came on for trial at 10 o'clock A. M., this day sitting without a jury,

Messrs. Lorrin Andrews and Frank Andrade appearing as attorneys for the plaintiffs, and Messrs. Frear and Prosser, of the firm of Frear, Prosser, Anderson & Marx, and Messrs. W. L. Stanley, and C. H. Olson, of the firm of Holmes, Stanley & Olson, appearing as attorneys for the defendants.

Mr. Andrews reads the plaintiffs' amended complaint and makes opening statement on behalf of the plaintiffs.

Mr. Olson reads the defendants' answer, relying upon the statute of limitations as their ground of defense.

Henry Peters, Clerk of the Land Office, is called, sworn [19] and examined as a witness on behalf of the plaintiffs, and had with him Royal Patent No. 27 to Alexander Adams, dated May 21, 1849 showing land at Honolulu, in Vol. 1 of Patents.

Mr. Andrews states that he will file a certified copy of this patent and offer it in evidence.

Mr. Prosser objects.

The Court overruled the objection.

Certified copy of Royal Patent No. 27, received in evidence and marked Plaintiffs' Exhibit "A."

Land Commission Award No. 801 to Alexander Adams dated January 29, 1849, showing land at Honolulu, was also read, and Mr. Andrews offers a certified copy of this award in evidence.

Mr. Prosser objects.

The Court overruled the objection.

Certified copy of Land Commission Award received in evidence and marked as Plaintiffs' Exhibit "B."

No cross-examination.

Geo. C. Kopa, Deputy Registrar of Conveyances, is called, sworn and examined as a witness on behalf of the plaintiffs, and had with him Vol. 4. On page 214 of said volume, he reads a deed executed by Alexander Adams to Alexander Adams, Jr., under date of June 22, 1850, conveying land in Honolulu.

Mr. Andrews states that he will introduce a certified copy of the deed in evidence later on.

Mr. Prosser objects.

The Court overruled the objection.

Certified copy of the deed received in evidence and marked Plaintiffs' Exhibit "C."

Witness reads from Volume 11 at page 75 a deed executed by Alexander Adams, Jr., to Peke and Maria under date of September 15, 1858. [20]

Mr. Andrews states that he will introduce later on a certified copy of this deed in evidence.

Mr. Prosser objects.

The Court overruled the objection.

Certified copy of the deed received in evidence and marked as Plaintiffs' Exhibit "D."

No cross-examination.

Mrs. Mary Kaleialii, one of the plaintiffs, is called, sworn and examined. Mr. Charles L. Hopkins, Official Hawaiian Interpreter, interpreting.

Mr. Prosser cross-examines.

Redirect examination by Mr. Andrews.

Mrs. R. N. Boyd is called, sworn and examined as a witness on behalf of the plaintiffs.

No cross-examination.

At 11:25 A. M. Court takes a recess for a space of five minutes and reconvened at 11:30 A. M.

Mr. Andrews moves to amend the plaintiffs' amended complaint by striking out the figures 63.7 feet and inserting in lieu thereof the figures 53.7 feet.

The Court allows the amendment.

Robert D. King, surveyor from the Territorial Survey Department, is called, sworn and examined as a witness on behalf of the plaintiffs. He had with him Territorial Registered Map No. 1387. Mr. Andrews offers in evidence tracing of this map.

Mr. Olson objects.

The Court overruled the objection.

Received in evidence and marked as Plaintiffs' Exhibit "E."

At 12 o'clock M. Court adjourned to 2 o'clock P. M. [21]

AFTERNOON SESSION.

Mr. King resumed the witness-stand.

Mr. Prosser cross-examines.

Redirect examination by Mr. Andrews.

Court at 2:35 P. M. takes a recess for five minutes and reconvened at 2:40 P. M.

Mrs. Mary Kaleialii is recalled by the defendant.

Mr. Prosser offers in evidence Records of Birth taken from original copy of the records in the Territorial Board of Health in Volume 4A on page 80, showing the date of birth of Napunako, by Edwin Boyd, father, and Peke, mother, on September 2, 1863, at the Pauoa School, in Honolulu.

Received in evidence and marked Defendants' Exhibit "1."

Geo. C. Kopa, Deputy Registrar of Conveyances, is called as a witness on behalf of the defendants, and had with him Government Record No. 26, and at page 434 of said record appears a deed. Mr. Prosser moves to offer a certified copy of the document in evidence.

Mr. Andrews objects.

The Court overruled the objection.

Received in evidence and marked Defendants' Exhibit "2."

The witness is thereupon instructed to read a document in Liber 96 at page 354, showing a deed dated October 21, 1855.

Mr. Prosser moves to offer a certified copy of the document in evidence.

Mr. Andrews objects.

The Court overruled the objection.

Received in evidence and marked Defendants' Exhibit "3."

The witness is also instructed to turn on page 277 in Liber 97, wherein appears a Trust Deed.

Mr. Prosser moves to offer the Trust Deed in evidence and will file a certified copy of the document later on. [22]

Mr. Andrews objects.

The Court overruled the objection.

Received in evidence and marked Defendants' Exhibit "4."

Mr. Prosser offers in evidence a Trust Deed made and executed by C. Bolte and G. H. Robertson to

J. J. Sullivan and J. Buckley, dated December 8th, 1885, and of record in Liber 99 at page 97 et seq.

Mr. Andrews objects.

The Court overruled the objection.

Trust Deed received in evidence and marked Defendants' Exhibit "5."

Geo. H. Robertson is called, sworn and examined as a witness on behalf of the defendants.

Mr. Andrews cross-examines.

Mr. C. L. Hopkins is called, and sworn and examined as a witness on behalf of the defendants.

No cross-examination.

C. Bolte is called, sworn and examined as a witness on behalf of the defendants.

No cross-examination.

John Buckley is called, sworn and examined as a witness on behalf of the defendants.

Mr. Andrews cross-examines.

At 3:50 P. M. defendants rest.

Thereupon the Court requested both parties to furnish the Court with an abstract of title of their claim within 5 days and case was then submitted.
[23]

Minutes of Court—August 28, 1915.

Saturday, August 28, A. D. 1915.

L. 8032.

R. N. BOYD and MARY KALEIALII,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et als.,

Defendants.

ACTION TO QUIET TITLE.

The above-entitled cause came on this day upon the settlement of the questions of law to be reserved to the Supreme Court, Lorrin Andrews, Esq., appearing as attorney for the plaintiffs, and W. F. Frear, Esq., of the firm of Frear, Prosser, Anderson & Marx, and C. H. Olson, Esq., of the firm of Holmes & Olson, appearing as attorneys for the defendants.

After argument by counsel, it was decided that but one question of law be reserved, viz: the construction of the deed from Alexander Adams, Jr., to Peke and Maria; the Court instructing the attorneys on either side to submit forms of reserved question on Monday morning.

At 10:25 A. M. Court takes recess subject to call.

At 12:00 M. Court adjourns to Monday, August 30, A. D. 1915, at 10 o'clock A. M.

Minutes of Court—August 30, 1915.

Monday, August 30, A. D. 1915.

L. 8032.

R. N. BOYD, et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et als.,

Defendants,

ACTION TO QUIET TITLE.

On account of the departure of C. H. Olson, Esq., for the mainland of the United States of America on this day the Court orders all cases in which he appears as attorney of record, either for plaintiff or defendant, are hereby continued. [24]

Minutes of Court—September 1, 1915.

Wednesday, September 1, A. D. 1915.

L. 8032.

MARY KALEIALII et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et als.,

Defendants,

ACTION TO QUIET TITLE.

This cause on this day certified to the Supreme Court on reserved question of law for consideration of the Supreme Court of the Territory of Hawaii.

Minutes of Court—January 12, 1916.

Wednesday, January 12, A. D. 1916.

L. 8032.

R. N. BOYD. et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et als.,

Defendants,

ACTION TO QUIET TITLE.

The Court on this day renders its decision as follows:

Decision.

This cause coming on for trial on this day, the Court finds from the *remittitur* in the Supreme Court that the questions heretofore submitted to that Court have been decided in favor of the defendant.

The Court holds that such question is decisive of this case. Therefore the judgment is in favor of the defendants.

Dated Honolulu, Hawaii, January 12, 1916.

[Seal] (S) T. B. STUART,

Third Judge, First Circuit Court.

Mr. Andrews excepts to the decision as contrary to the law, the evidence and the weight of evidence and gives notice of appeal to the *Ninth Circuit of Appeals*. [25]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January, A. D. 1915, Term.

MARY KALEIALII, REBECCA LEHIA
MILES, and ANNIE K. BOYD, and ROBERT
N. BOYD, and VICTOR K. BOYD,
by their Guardian *ad litem*, JOSEPHINE
BOYD,

Plaintiffs,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE, and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants,

Reservation of Questions of Law for Consideration of the Supreme Court.

ACTION TO QUIET TITLE.

This action to quiet title to an undivided half interest in certain land hereinafter referred to, having been tried and submitted to the Court, sitting without a jury, upon the plaintiff's amended complaint, the defendants' answer and the evidence and briefs presented by the respective parties, the Court now reserves for the consideration of the Supreme Court of the Territory the questions of law hereinafter set forth and for that purpose hereby reports to said Supreme Court so much of the cause as may be necessary to a full understanding of said question.
[26]

THE FACTS.

1. Alexander Adams, Jr., being then the owner of said land in fee simple, conveyed the same (with other lands) to his daughters Peke (known also as Peke Stone) and Maria (known also as Maria A. Boyd) by a deed dated September 15, 1858, a copy of which deed marked Exhibit "A," and a translation of the same, marked Exhibit "B," agreed by the parties to be a correct translation, are hereto attached and made a part hereof. The land in question is that part of the land which is referred to in said deed as a house lot on Hotel Street.

2. Said Peke thereafter executed and delivered to said Maria two deeds dated December 1, 1868, and October 21, 1885, respectively, in terms conveying her interest in said land to said Maria and her heirs

forever, copies of which deeds and translations thereof are hereto attached, marked Exhibit "C" and Exhibit "D," respectively. Said Maria thereafter executed and delivered to G. H. Robertson and C. Bolte a deed dated October 26, 1885, in terms conveying to them and the survivor of them and their successors in trust all of said land, and said G. H. Robertson and C. Bolte thereafter executed and delivered a deed dated December 8, 1885, in terms conveying all of said land to John J. Sullivan and John Buckley and their heirs and assigns forever, who, and whose assigns, have ever since been and now are in possession of said land and have from time to time made valuable improvements thereon. Said John Buckley is one of the defendants herein and the other defendants are the successors in interest of said John J. Sullivan. Said Maria died in 1894, leaving children who still survive.

3. Said Peke died on July 5, 1914, leaving surviving her only two children, namely, Mary Kaleialii, born on October 20, 1859, one of the plaintiffs herein, and Robert N. Boyd, born on September 2, 1863, who died on September 9, 1914, leaving surviving him four children, namely, Rebecca Lehia Miles, Annie K. [27] Boyd, Robert N. Boyd and Victor K. Boyd, the other plaintiffs herein. Evidence was presented at the trial to show that said children of Peke were illegitimate but no finding of fact has yet been made on that point and no question of law is now reserved in respect thereto.

THE QUESTIONS RESERVED.

(1) What interest or estate in said land did said

deed from Alexander Adams, Jr., convey to said Peke.

(2) What interest or estate, if any, in said land did said deed from Alexander Adams, Jr., convey to such children, if any, of Peke as are referred to in said deed.

Dated, Honolulu, T. H., August 31st, 1915.

[Seal]

(S) T. B. STUART,

Third Judge, Circuit Court, First Judicial Circuit.

[28]

Exhibit "A,"—Deed, September 15, 1858, Alexander Adams Jr., to Peke and Maria.

ALEXANDER ADAMS, Jr., DEED TO PEKE
AND MARIA.

Sept. 15, 1858.

L. C. A. 5048, B. R. P. 1918—2349—2530.

Book II, pp. 75.

Olomana, Kona, Oahu.

He palapala hoolilo loa i ka aina keia hanaia i keia la umikumamalima o September, M. H. o ka Haku hookahi tausani ewalu haneri a me kanalima kumamawalu, o Alexander Adams, Jr., no Honolulu ma ka mokupuni o Oahu. Ka mea nona ka aoao mua a me Peke a me Maria kana mau Kaikamahine no ia wahi pu no ma ka aoao elua.

Ke hoiike nei o Alexander Adams, Jr., i oleloia maluna, a no kona makemake iho e hoomakaukau i mea e pono ai no kana mau kaikamahine, no Peke a me Maria, i mea e pale aku ai i na poino hiki wale mai, a no ka malama ana i ko laua mau kino ma na mea e pono ai, a me ka hanai ana ia laua. A no ka mea o Alexander Adams, Jr., a mamuli o kona make-make iho i kana mau kaikamahine i oleloia maluna

e pomaikai ana hoi laua i ka hua e loa mai ana a i na hoolimalima, a i na keiki, a me no hope a me na ukuia mai no na waiwai paa i kakauia a i hoakaa-kaia malalo iho nei o keia palapala a hiki aku i ka pau ana o ko laua ola a mau loa aku i ko, laua hoolilina me ke kuokoa i na kaohi ana me ke komo ole mai hoi o ka laua mau kane iloko o ia mau wahi oia hoi o ka laua mau kane i keia manawa, a e loa hou aku ana paha ma keia hope aku, ke ole e hanaia kekahi palapala hoolilo i na kane a laua. Nolaila ano ke hoike aku nei keia palapala o Alexander Adams, Jr., i oleloia maluna, a no ka pono o na mea i oleloia maloko nei, a no na dala elua hoi i haawiia mai iloko o kona lima e na mea nona ka aoao elua i oleloia maluna, a ua loa io mai no ia mea hoike aku i ka hana ana, kuai ana, haawi ana, hoolilo ana, hookuu ana, hooki ana a hoopau ana hoi, nolaila ma keia palapala ke hana nei, kuai lilo, haawi ana, hoolilo aku, hookuu ana, hookuu aku, a hoolili loa ana aku i na mea nona ka aoao elua i oleloia maluna o kela mau apana aina a pau loa e waiho ana ma Olomana iloko o Honolulu aina, a me ka pahale e waiho ana iloko o ke kulanakauhale o Honolulu e pili ana i ke alanui Hotele (Kuleana Helu 5049 B) o kekahi no Malule i kuai ia mai ma ka la [29] ekolu o Augate 1854, palapala sila nui helu 1918 i kakau inoa ia ma ka la 11 o Aperila, 1858, a me ka Palapala Sila Nui Helu 2349 a me 2530 i kakau inoa ia ma ka la 8 o Aperila, 1857, a ma ka la 14 o September, 1858, a me ka pahale i haawiia mai ma ke ano Alodio o Alexander Adams i kakauia ma ka la 22 o June, 1850, a i hooiaio ia e A. Bates ma ka la 22 o Augate, 1850,

a penei na palena o ia mau apana aina :

4 loi ma Olomana (Kuleana Helu 5049 B a Sila Nui Helu 1918, e hoomaka ana ma ke kihi Akau o keia aina a e ana aku Hema 33° Hik 206 pauk me Kaholo a Hema 49° Kom 198 pauk, me Aupuni Akau 29° Kom 277 Pauk me Aupuni no ke kula.

Akau 35½° hik 31 pauk me Kaholo akau 61° hik 66 pauk me Kaholo.

Hema 59° hik 45 pauk me Kaholo akau 61° hik 66 pauk me Kaholo.

Akau 61° hik 66 pauk me Kaholo akau 61° hik 66 pauk me Kaholo.

Hema 59° hik 45 pauk me Kaholo akau 61° hik 66 pauk me Kaholo.

Akau 70° hik 64 pauk me Kaholo a hiki i ka hoomaka ana ia. Ka Ili 47/100 o ka eka.

2 loi (Sila Nui Helu 2349) E hoomaka ke ana ma ke kihi Hema o keia a holo Akau 53° Hik 189 pauk aoao ma kahawai alaila Akau 37° kom 125 pauk ma ke aupuni alaila Hema 49° kom 50 pauk a ma ka.

Akau 29° kom 283 pauk pili me Keoki, alaila, Hema 60° 50' kom 44 pauk a me.

Hema 55° 0' kom 133 pauk me Kaholo, alaila.

Hema 32° 0' hik 342 pauk a me.

Hema 47° 0' hik 73 pauk ma ka aina o Paia a i ka hoomaka ana, he 46/100 o ka eka.

4 loi ma ke kula (Sila Nui Helu 2530) e hoomaka ana i ke ana ma ke kihi Komohana makai o keia ma ka aoao Komohana Akau o ke kahawai e pili ana i ko Napunako a me ko Paia a holo.

Hema 46° Hik 765 pauk ma ko Paia a.

Akau 39° 30' Hik 285 pauk ma ko Auwaiolimu.

Akau 23° 30' Kom 670 pauk ma Kalokohonu a ma kela aoao o ke kahawai.

Hema 68° 30' Kom 62 pauk ma ko Papamakua.

Akau 34° 0' Kom 87 pauk ma ko Papamakua.

Hema 54° 30' Kom 140 pauk ma ko Papamakua.

Hema 30° 30' Hik 75 pauk ma ko Kaholo.

Hema 60° 30' Kom 46 pauk ma ko Kaholo.

Akau 36° 30' Kom 141 pauk ma ko Kaholo.

Hema 47° 30' Kom 140 pauk ma ko Napunako

Hema 36° 0' Hik 124 pauk ma ko Napunako.

Hema 55° 30' Kom 191 pauk ma ko Napunako.

a hiki i kahi i hoomaka ai, he 3-18/100 eka.

Pahale e pili ana i ke alanui Hotele iloko o ke kulanakauhale i kuleanaia ma ka inoa o Alexander Adams a hoolilo loa ia mai ka la 22 o June, 1850, a i kopeia ma ka Buke Aupuni ma ke keena kakau [30] kope i kopeia ma ka Buke 4 a me ka aoao 214 o ka la 22 o Augate, 1850.

Commencing at John Duke's house along the street south east by E $1\frac{1}{2}$ E 46 feet 6 inches then NE; N 62 feet then NW by W 44 feet thence SW $1\frac{1}{2}$ W 72 feet to the place of commencement. E lilo pu no hoi na mea maluna iho na hale a me na mea e pili mai ana o na pono a me na pomaikai a me na loa a pau loa mai ana ma ke Kanawai a me ke Kaulike ma ua mau aina la ma na aoao a pau, a oia mau mea a pau a me na waiwai a me na pono e pili ana i ka aoao mua, e lilo ia no Peke a me Maria a me ko laua mau pani hakahaka a me na hooilina a i na hope no ka manawa pau ole.

A o Alexander Adams, Jr., i oleloia maluna a hiki i ka make ana o kana mau kaikamahine alaila

e waiho aku laua i keia aina a me na pono e pili ana i ka laua mau mea e kauoha aku ai, ke hanaia me ka oiaio a me ka pololei, aka ina e hana ole ia elike me ka olelo maluna, ka hoolilo ana, a me ka hooiaio ana. Alaila e hoihoi ia no keia mai aina a me na mea a pau e pili ana ia Alexander Adams Jr., ka aoao mua, a i kona mau hooilina, a no lakou wale no na pomaikai ke ole he mau keiki a ka aoao elua, aka, ina he mau keiki ka na mea nona ka aoao elua e ili aku no na pono a pau elike me ka pili ana i na makua.

Eia keia ina e make kekahi o na mea ma ka aoao elua aole ana keiki e ola ana ia wa, e ili aku kona pono a pau i oleloia ke hoike aku nei me ka hoohiki ana a me ka apono ana aku i na mea a pau iloko o keia palapala a ke hoopaa nei a ke ae pu nei me ka mea nona ka aoao mua i oleloia maluna a manaoio a e hooiaio aku, a e hoopaa a hooko i ka oiaio o keia palapala a me na ano a pau i oleloia maloko nei; I hoike no keia ke kakau nei wau me kuu lima a me ka sila i keia la a me ka makahiki i oleloia maluna.

(Sgd.) ALEXANDER ADAMS, Jr.

Hanaia a kakau inoa ia a Silaia a haawiia ma ka ike maka ana o.

(Sgd.) J. L. MAILIILII,

(Sgd.) KAAIAHUA. [31]

Register Office, Oahu, Sept. 15th, A. D. 1858, personally appeared before me Alexander Adams, Jr., and acknowledged that he had executed the foregoing instrument for the uses and purposes therein set forth.

(Sgd.) THOMAS BROWN,

Deputy Registrar of Conveyances.

Received and compiled the 15th day of September,
A. D. 1858, 3/4 past two o'clock P. M.

(Sgd.) THOMAS BROWN,
Deputy Registrar of Conveyances. [32]

**Exhibit "B"—Translation of Exhibit "A" Deed,
September 15, 1858, Alexander Adams Jr., to
Peke and Maria.**

This deed is an absolute conveyance of land made this 15th day of September in the year of our Lord One Thousand Eight Hundred and Fifty-*either* between Alexander Adams, Jr., of Honolulu, Island of Oahu, the party of the first part and Peke and Maria, his daughters of the same place of the second part.

WITNESSETH: That the above-named Alexander Adams, Jr., of his own volition, in order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance. And whereas, the said Alexander Adams, Jr., because of his own desire for the afore-said daughter that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter providing no conveyance is made to their husbands.

Now therefore this deed showeth that the above-mentioned Alexander Adams, Jr., in consideration of

the statements herein made and of two dollars paid into his hands by the parties of the above-mentioned second part which has been received in witness of the making, sale, giving, conveying, releasing, effectuating and confirming, therefore, by this deed, do make, sell, give, convey, release, effectuate and forever *wuit* claim to the parties of the second part hereinabove mentioned all those certain pieces of land situated at Olomana, Honolulu, and the house lot situated in the town of Honolulu, along Hotel Street (L. C. A. 5049 B) to Keoki no Malule; deeded to me on the 3d day of August, 1854, Royal Patent 1918, acknowledged on the 11th day of April, 1855, and also grant 2349 and 2530 signed on the 8th day of April, 1857, and the 14th day of September, 1858, and the house lot sold to me by deed from [33] Alexander Adams, signed on the 22d day of June, 1850, and acknowledged by A. Bates on the 22d day of August, 1850, the descriptions of which are as follows:

4 Taro patches in Olomana (L. C. A. 5049 B. R. P. 1918) Commencing at the north corner of this land and surveyed as follows:

South 23° E. 206 links along Kaholo

South 49° W. 198 links along Government

North 29° W. 277 links along Government dry
land

North 35½° E. 31 links along Kaholo

North 61° E. 66 links along Kaholo

South 59° E. 45 links along Kaholo

North 61° E. 66 links along Kaholo

South 59° E. 45 links along Kaholo

North 70° E. 64 links along Kaholo to the place of commencement. The area is 47/100 acres.

2 Taro patches (Grant 2349). Commencing at the south corner of this and running north 53° E. along the stream 189 links thence

North 37° W 125 links along Government, thence

South 49° W 50 links thence

North 29° W 283 links along Keoki, thence

South $60^{\circ} 50'$ W 44 links thence

South $55^{\circ} 0'$ W 113 links along Kaholo, thence

South $32^{\circ} 0'$ W 342 links thence

South $47^{\circ} 0'$ E 73 links along land of Paia to the point of beginning containing 46/100 acres.

4 Taro patches and dry land (Grant 2530). Commencing at the west corner makai of this land at the northwest corner of stream along the land of Napunako and Paia and running:

South 46° E 765 links along Paia, thence

North $39^{\circ} 30'$ E 285 links along Auwaiolimu,

North $23^{\circ} 30'$ W 670 links along Kalokohonu to the opposite side of stream

South $68^{\circ} 30'$ W 62 links along Papamakua

North $34^{\circ} 0'$ W 87 links along Papamakua

South $54^{\circ} 30'$ W 140 links along Papamakua

South $30^{\circ} 30'$ E 75 links along Kaholo

South $60^{\circ} 30'$ W 46 links along Kaholo

North $36^{\circ} 30'$ W 141 links along Kaholo

South $47^{\circ} 30'$ W 140 links along Napunako

South $36^{\circ} 0'$ E 124 links along Napunako

South $55^{\circ} 30'$ E 191 links along Napunako to the place of commencement, containing 3-18/100 acres.

House lot along Hotel Street in the City of Honolulu, the land commission of which is issued to Alexander Adams, which was sold to me on the 22d day of June, 1850, copied in the Government Registry [34] of Conveyances, Buke 4, page 214, on the 22d day of August, 1850.

Commencing at John Duke's house along the street southeast by east $\frac{1}{2}$ E. 46.6 feet, thence NE. $\frac{1}{2}$ N. 62 feet, thence NW. by W. 44 feet thence SW. $\frac{1}{2}$ W. 72 feet to the place of commencement.

To have together with the things thereupon the houses and appurtenances, rights and privileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interest and rights appertaining to the party of the first part (shall belong to Peke and Maria and to their representatives and heirs and assigns forever.

And the above-mentioned Alexander Adams, Jr., and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr., of the first part and to his heirs and the benefits shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner enjoyed by their parents.

Provided that if one of the parties of the second part should die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them.

The parties of the second part hereinabove set forth do hereby witness under oath and by affirmation as well to all the contents of this deed and do hereby bind and both consent to and with the party of the first part hereinabove mentioned to ratify and certify and to bond and execute to the truth of this deed as well as to all the conditions herein contained.
[35]

In witness whereof I hereby sign with my hand and seal this day and year first above written.

(Sgd.) ALEXANDER ADAMS, Jr.

Made, signed and sealed in the presence of

(Sgd.) J. L. MAILILII.

(Sgd.) KAAIAHUA.

Register Office, Oahu, September 15th, 1858, personally appeared before me Alexander Adams, Jr., and acknowledged that he executed the foregoing instrument for the uses and purposes therein set forth.

(Sgd.) THOMAS BROWN,

Deputy Registrar of Conveyances.

Received and compiled the 15th day of September, A. D. 1858, at $\frac{3}{4}$ past two o'clock P. M.

(Sgd.) THOMAS BROWN,

Deputy Registrar of Conveyances. [36]

**Exhibit "C"—Deed, December 1, 1868, Peke A.
Stone to Maria A. Boyd.**

BOOK 26, PAGES 434-435.

Stamped.

E ike auanei na kanaka a pau ma keia palapala Owau o PEKE A. STONE no Honolulu, Mokupuni Oahu, Kaikamahine no Alexander Adams, Junior, no ka mea ua haawi mua mai o MARIA A. BOYD, kuu kaikaina, no Honolulu no, i hookahi dala iloko o kuu lima, a ke ae aku nei au ma keia palapala ua loa no ia'u ia dala, a no kuu aloha nui hoi ia MARIA A. BOYD, kuu kaikaina.

Nolaila, ua kuai, ua haawi a ua hoolilo a ma keia palapala ke kuai, ke haawi a ma keia ke hoolilo loa akunei au ia MARIA A. BOYD a i kona mau hooilina a no kona mau hope no ka manawa pau ole i kuu pono, kuu pomaikai, a me kuu kuleana a pau iloko o na apana aina a pau ma ka Mokupuni Oahu i hoolilo ia ia'u a me MARIA i oleloia maluna e Alexander Adams Junior ma kana palapala hoolilo i hanaia ma ka la 15 o Sepatemaba, M. H. 1858, a ua kopeia ma ke Keena o ka Luna Kakau Kope ma Honolulu ma ka Buke 11 ma na aoao 75, 76 a me 77, a ua hoakakaia na palena o ia mau apana aina ma kela palapala hoolilo.

E lilo loa keia mau Apana Aina ia MARIA A. BOYD a i kona mau hooilina a me Kona mau hope, me na mea apau e pili ana i ka Aina, a ke hai aku nei au ma keia palapala, aole o'u kuleana i koe ma kela mau Apana Aina i hoikeia maloko o ka palapala hoolilo a ko maua makuakane.

I hoike no keia ua kakau au i kuu lima a me kuu Sila i keia la mua o Dekemaba, M. H. Hookahi tausani ewalu haneri me kanaono Kumamawalu.

WITNESS:

W. AULD.

[Seal] (Signed) PEKE A. STONE.

REGISTER OFFICE,

OAHU,—ss.

On this 1st day of December, A. D. 1868, [37] personally appeared before me Peke A. Stone, party to the foregoing instrument who acknowledged that she had executed the same for the uses and purposes therein set forth.

(Signed) THOMAS BROWN,

Registrar of Conveyances.

Recorded and compared this 1st day of December, A. D. 1868, at 1 o'clock P. M.

THOMAS BROWN,

Registrar of Conveyances. [38]

**Translation of Exhibit "C," Deed, December 1, 1868,
Peke A. Stone to Maria A. Boyd.**

Book 26, Pages 434-435.

(TRANSLATION OF PRECEDING DEED.)

Stamped.

KNOW ALL MEN BY THESE PRESENTS, that I, PEKE A. STONE, of Honolulu, Island of Oahu, the daughter of Alexander Adams, Junior, whereas my younger sister Maria A. Boyd of Honolulu had already given unto my hand ONE DOLLAR, the receipt whereof by these presents is hereby acknowledged and for the great love I bear unto the

said MARIA A. BOYD, my younger sister.

THEREFORE I have sold, granted and conveyed, and by these presents I do hereby sell, grant and convey unto MARIA A. BOYD and to her heirs and representatives forever all my right, easement and interest in all those pieces of land situate in the Island of Oahu, conveyed to me and Maria aforesaid by Alexander Adams Junior by his deed dated September 15, A. D. 1858, and recorded in the Office of the Registrar of Conveyances at Honolulu, in Book 11, pages 75, 76 and 77, said pieces of land are more fully described in said deed.

TO HAVE AND TO HOLD the said pieces of land unto MARIA A. BOYD and to her heirs and representatives forever, with all of the appurtenances belonging to said lands, and I do hereby declare by these presents that I have no more interest in the aforesaid pieces of land described in the said deed from our father.

IN WITNESS WHEREOF I have hereunto set my hand and seal the first day of December, A. D. One Thousand Eight Hundred and Sixty-eight.

[Seal]

(Signed) PEKE A. STONE.

Acknowledgment and recording same as in Hawaiian deed attached. [39]

Exhibit "D"—Deed, October 21, 1885, Peke A. Stone to Maria A. Boyd.

Book 96, Page 354.

Stamped \$1.00.

E ike auanei na kanaka a pau ma keia palapala owau o PEKE A. STONE, ka wahine mare o J. M. Stone i make ma Kaleponi, ua kuai, haawi a hoolilo,

a ma keia palapala ke kuai, haawi a hoolilo loa aku nei au ia MARIA A. BOYD, no Honolulu, Mokupuni o Oahu, i kuleana a pau loa iloko o na Aina a pau loa, ka palena, ua hoikeia maloko o kekahi palapala kuai i hanaia e Alex. Adams, Jr. ia Peke a me Maria, a ua kopeia ia palapala kuai ma ka Buke o ke Aupuni Heluu 11 aoao 75, 76 a me 77, a ua Alexander Adams, Jr., la, ka makuakane pono i o Maria A. Boyd a me a'u.

Eia ke kumu o kuu hoolilo ana i kuu kuleana iloko o ia mau apana aina, no kuu aloha i kuu kaikaina a no kona haawi ana mai iloko o kuu lima i hookahi dala.

Nolaila ua lilo loa aku kuu kuleano a pau iloko o ua mau apana aina la ia MARIA A. BOYD a me kona mau hooilina a hope paha no ka manawa pau ole, e lilo pu no hoi me na pono, na pomaikai, a me na mea a pau i pili pono i ka aina, a lilo loa ia MARIA A. BOYD a me kona mau hooilina a hope paha no ka manawa pau ole. A no ka oiaio o keia ke kau nei au i kuu inoa a e hoopili pu no hoi i kuu sila ma keia la 21 o Okatoba, 1885.

[Seal]

REBECCA ADAMS STONE.

IMUA O. G. H. ROBERTSON.

O A H U—ss.

On this 22d day of October, 1885, personally appeared before me Rebecca Adams Stone to me known to be the person described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

(Signed) CECIL BROWN,

Agent to Take Acknowledgment, Island of Oahu.

Recorded and compared this 23d day of October,
A. D. 1885, at 11 o'clock A. M.

MALCOLM BROWN,
Deputy Registrar of Conveyances. [40]

**Translation of Exhibit "D"—Deed, October 21, 1885,
Peke A. Stone to Maria A. Boyd.**

Book 96, Page 354.

(TRANSLATION OF ATTACHED DEED.)

Stamped \$1.00.

KNOW ALL MEN BY THESE PRESENTS,
that I, PEKE A. STONE, the wife of J. M. Stone,
who died in California, have sold, granted and con-
veyed and by these presents do hereby sell, grant and
forever convey unto MARIA A. BOYD of Honolulu,
Island of Oahu, All my interest in all the lands de-
scribed in that certain deed made by Alex. Adams,
Jr., to Peke and Maria, the said deed is recorded in
the Book of the Government Number 11, Pages 75, 76
and 77, the said Alexander Adams, Jr., is the own
father of Maria A. Boyd and myself.

The reason I have conveyed my interest in the
aforesaid pieces of land is on account of the love I
bear unto my younger sister, and also she has given
into my hand the sum of One Dollar.

Therefore I have conveyed all my interest in the
said pieces of land to Maria A. Boyd and to her heirs
and representatives forever, also all the rights, ease-
ments and appurtenances to the same belonging.

IN WITNESS WHEREOF I have hereunto set

my hand and affixed my seal this 21st day of October, 1885.

[Seal] (Signed) REBECCA ADAMS STONE.

In presence of:

G. H. ROBERTSON.

(Same acknowledgment and recording as preceding deed.)

[Endorsed]: L. 8032. Reg. 4, Pg. 498. Circuit Court First Circuit. Territory of Hawaii, January Term, 1915. Mary Kaleialii, et al, Plaintiffs, vs. Henrietta Sullivan et al, Defendants. Reservations of Questions of Law for Consideration of the Supreme Court. Filed Sept. 1st, 1915, at 10 o'clock A. M. B. N. Kahalepuna, Clerk. [41]

*In the Supreme Court of the Territory of Hawaii,
October Term, 1915.*

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD and VICTOR K. BOYD, by their
guardian *ad Litem*, JOSEPHINE BOYD, v.
HENRIETTA SULLIVAN, JOHN BUCK-
LEY and HENRY HOLMES, Trustee under
the will of JOHN J. SULLIVAN,
HENRIETTA SULLIVAN, JOHN BUCK-
LEY, PRISCILLA ALBERTA SULLIVAN
CLARKE, and ROBERT KIRKWOOD
CLARKE, a minor, JUANITA ELLEN
CLARKE, a minor, and THOMAS WAL-
TERS CLARKE, a minor.

Opinion of Supreme Court, Territory of Hawaii.

Hon. T. B. STUART, Judge.

Argued October 21, 1915.

Decided November 9, 1915.

WATSON and QUARLES, JJ., and Circuit Judge ASHFORD in place of ROBERTSON, C. J., Disqualified.

Deeds—Construction.—A deed to P and M, habendum to P and M and “their representatives, heirs and assigns forever,” conveys to each of said grantees a fee simple in an undivided half of the land.

Same—Same—Clearly expressed intention of parties given effect.—Where the granting clause and habendum in a deed decisively show the intention of the parties ambiguities and inconsistencies in other and subsequent clauses of the deed will not defeat such intention. [42]

OPINION OF THE COURT BY WATSON, J.

This action, to quiet title to a parcel of land situate on Hotel street in Honolulu, was tried by the Court, jury waived, and was submitted below on the pleadings and the evidence and briefs presented by the respective parties. It comes here on reserved questions which require the construction of a certain deed in the Hawaiian language, executed by Alexander Adams, Jr., to his two daughters, Peke and Maria. A translation of the material parts of the deed, as agreed to by the parties, is as follows:

“This deed is an absolute conveyance of land made

this 15th day of September in the year of our Lord One Thousand Eight Hundred and Fifty-eight between Alexander Adams, Jr. of Honolulu, Island of Oahu, the party of the first part, and Peke and Maria, his daughters of the same place of the second part.

“WITNESSETH: That the above-named Alexander Adams, Jr. of his own volition, in order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance. And whereas, the said Alexander Adams, Jr. because of his own desire for the aforesaid daughters that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter, providing no conveyance is made to their husbands.

“Now therefore this deed showeth that the above-mentioned Alexander Adams, Jr. in consideration of the statements herein made and of two dollars paid into his hands by the parties of the above-mentioned second part which has been received in witness of the making, sale, giving, conveying, releasing, effectuating and confirming therefore, by this deed do make, sell, give, convey, release effectuate and forever quit claim to the parties of the second part hereinabove mentioned all those certain pieces of land” (here

follows a description of the land conveyed, including the parcel in question).

“To have together with the things thereupon the houses and appurtenances, rights and privileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interest and rights appertaining to the party of the first part (shall belong to Peke and Maria and to their representatives and heirs and assigns forever.

“And the above-mentioned Alexander Adams, Jr. and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr. of the first part and to his heirs and the benefits shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner enjoyed by their parents. [43]

“Provided that if one of the parties of the second part should die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them.

“The parties of the second part hereinabove set forth do hereby witness under oath and by affirmation as well to all the contents of this deed and do hereby bind and both consent to and with the party

of the first part hereinabove mentioned to ratify and certify and to bond and execute to the truth of this deed as well as to all the conditions herein contained.

“In witness whereof I hereby sign with my hand and seal this day and the year first above written.

“ALEXANDER ADAMS, Jr.”

The following facts, *inter alia*, are reported by the presiding judge of the trial court:

“1. Alexander Adams, Jr., being then the owner of said land in fee simple, conveyed the same (with other lands) to his daughters Peke (known also as Peke Stone) and Maria (known also as Maria A. Boyd) by a deed dated September 15, 1858 * * * ” (a translation of the same, agreed to by the parties to be a correct translation, being hereinabove set out).

“2. Said Peke thereafter executed and delivered to said Maria two deeds dated December 1, 1868, and October 21, 1885, respectively, in terms conveying her interest in said land to said Maria and her heirs forever. * * * Said Maria thereafter executed and delivered to G. H. Robertson and C. Bolte a deed dated October 26, 1885, in terms conveying to them and the survivor of them and their successors in trust all of said land, and said G. H. Robertson and C. Bolte thereafter executed and delivered a deed dated December 8, 1885, in terms conveying all of said land to John J. Sullivan and John Buckley and their heirs and assigns forever, who, and whose assigns, have ever since been and now are in possession of said land and have from time to time made valuable improvements thereon. Said John Buck-

ley is one of the defendants herein and the other defendants are the successors in interest of said John J. Sullivan. Said Maria died in 1894, leaving children who still survive.”

“3. Said Peke died on July 5, 1914, leaving surviving her only two children, namely, Mary Kaleialii, born on October 20, 1859, one of the plaintiffs herein, and Robert N. Boyd, born on September 2, 1863, who died on September 9, 1914, leaving surviving him four children, namely, Rebecca Lehia Mlies, Annie K. Boyd, Robert N. Boyd and Victor K. Boyd, the other plaintiffs herein. * * * ”

The plaintiffs claim that the deed from Alexander Adams, Jr., to his daughters Peke and Maria, have only a life interest in one-half of the land to each of the grantees with remainder in fee simple to their respective children, and that on the death of Peke on July 5, 1914, her life estate ended and a remainder in fee simple in her half of the land took effect in possession in her two surviving children, namely, Mary Kaleialii (one of the plaintiffs) and Robert N. Boyd, who was the only other original plaintiff, but upon whose death, September 9, 1914, his children were substituted [44] in his place as co-plaintiffs with Mary Kaleialii. The defendants claim that the deed to Peke and Maria gave them each a fee simple in half of the land and that Peke's interest passed to Maria by her two deeds of 1868 and 1885, and that the fee simple in both halves, or the whole of the land, passed by subsequent deeds from Maria through Robertson and Bolte to the defendants, who have been in undisturbed possession,

claiming under said deeds a fee simple title to the whole of the land, and spent large sums in improvements thereon, for the last thirty years.

Counsel for plaintiffs invoke the rule that deeds should be construed in accordance with the intention of the parties to them and argue that it is apparent from a reading of the entire instrument that the deed from Alexander Adams to his daughters, Peke and Maria, was intended to convey but a life interest to the grantees named therein with remainder over to their children, respectively. In support of this position counsel rely most strongly upon those portions of the deed contained in the premises: "In order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance"; "that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs"; and the portion of the deed immediately following the *habendum* clause as follows: "And the above-mentioned Alexander Adams, Jr., and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr., of the first part and to his heirs and the

benefits shall only be theirs providing the second [45] party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner enjoyed by their parents. Provided, that if one of the parties of the second part should die without issue living at the time, all the rights above mentioned shall descend to the survivor of them.”

We cannot adopt the position of counsel. According full recognition to the rule that deeds should be construed in accordance with the intention of the parties to them, that must be taken as qualified by the other rule that such intention must be ascertained from the language of the instrument itself. *Mercer v. Kirkpatrick*, 22 Haw. 644; *Green Bay & Miss. Canal Co. v. Hewett*, 42 Am. Rep. 701, 702. In *Ackerman v. Vreeland*, 14 N. J. Eq. 23, 28, the court, in construing a deed, said:

“It is a common law conveyance, and like all similar muniments of title, is to be construed according to its terms, and not according to the real or supposed intention of the parties.”

“The question is not, what was the intention of the parties, but what is the meaning of the words that they used.” Lord Denman in *Rickman v. Carstairs*, 5 B. & Ad. 651, 663.

It will be seen from the deed that the grantor, Alexander Adams, Jr., after first designating the deed “an absolute conveyance of land” (the term “absolute” is defined by Rapalje & Lawrence in their Law Dictionary as meaning “complete, final, perfect, unconditional, unrestricted”), conveyed to his

daughters, Peke and Maria, the land in contest, using the words, "do make, sell, give, convey, release, effectuate and forever quitclaim to the parties of the second part * * * all those certain pieces of land" (here follows a description of the land, including the parcel in question); "To have together with all the things thereupon the houses and appurtenances, rights and privileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interest and rights appertaining to the party of the first part (shall [46] belong to Peke and Maria and to their representatives and to their heirs and assigns forever)." In this case both the granting and *habendum* clauses of the deed convey the fee forever.

While it is true that there are no words of inheritance in the granting clause, the deed was executed in 1858 prior to the enactment of the statute which adopted the common law and the word "heirs" was not essential to convey a fee simple. *Branca v. Makuakane*, 13 Haw. 499. Even were this not the law in this jurisdiction, the *habendum* being to the grantees and their heirs and assigns, and there being no inconsistency between the granting clause and the *habendum*, the latter would control in the matter of fixing the estate of the grantees as one in fee.

"Where no estate is mentioned in the granting clause, then the *habendum* becomes efficient to declare the intention, and will rebut any implication which would otherwise arise from the omission in this respect in the preceding clause." *Riggin et al. v. Love et al.*, 72 Ill. 553.

Giving to the expressions found in the deed and relied on by plaintiffs all of the force to which they are entitled, the most that can be said of them is that they are ambiguous, and, if given the meaning contended for by plaintiffs, inconsistent with the clearly expressed intent of the parties as found in the granting clause and the *habendum*.

As to the language found in the premises of the deed, which is relied on by plaintiffs as showing that the estate conveyed to the daughters was one for life only, we are of the opinion that such language, if given its proper interpretation, is equally if not more consistent with a fee simple than with a life estate.

Touching the language found in the deed immediately following the *habendum*,—should it be conceded that such language indicates the intention of the parties that the grantees should take a life estate only, with remainder over, we are of the opinion that the attempt to so limit the absolute grant is null and void because utterly inconsistent with both the granting and the *habendum* [47] clauses of the conveyance. *Simerson v. Simerson*, 20 Haw. 57; *Nahaolelua v. Heen*, 20 Haw. 372, 377; *Ray v. Spears' Exr.*, 64 S. W. 413.

“If the deed contains a clause decisively showing the intention of the parties, ambiguities and inconsistencies in other clauses of the deed will not defeat such intention.” 2 Devlin on Deeds, sec. 837.

“In *Cholmondeley v. Clinton*, 2 Jac. & W. 84, which was a case most elaborately argued and consid-

ered, it was said by the court that, where a limitation in a deed is perfect and complete, it cannot be controlled by intention collected from other parts of the same deed. To support this rule of construction, the court cites and comments upon the following cases: Budd v. Brooke, 3 Gill, 198, 43 Am. Dec. 321; Ackerman v. Vreeland, 14 N. J. Eq. 23; Wilder v. Davenport, 58 Vt. 642, 5 Atl. 753; Cutley v. Tufts, 3 Pick. 272; Wilcoxson v. Sprague, 51 Cal. 640; Green Bay & M. Canal Co. v. Hewett, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382." Carl-Lee v. Ellsberry, 82 Ark. 209, 101 S. W. 407, 12 L. R. A., N. S., 956, 958.

The fact that the grantor invested the grantees (his daughters) with power to "leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty" is strongly indicative, if not conclusive, of the intent of the parties that the grantees were to take the fee. Ray v. Spears' Exr., *supra*.

"So, though a devise to a wife for life, and after her decease, she to give the same to whom she will, passes but an estate for life with a power; yet, if an express estate for life had not been devised to the wife, an estate in fee would have passed by the other words. 8 Vin. Abr. Devise, 4 W. a., pl. 4, p. 234." Burwell's Ex'rs. v. Anderson, Admr., 3 Leigh (Va.) 348, 356.

"A life estate is usually created by words of express limitation, and will not be assumed unless there are such words or their equivalent. If the deed shows by other provisions that the grantor intended

his grantee to hold an estate for life only, such would be its effect. But if there be inconsistent provisions, some indicating power of absolute disposal, which can only be had by the holder of the fee, and others creating a remainder which supposes a life estate, then the words of the *habendum* have a controlling significance." Green et al. v. Sutton et al., 50 Mo. 186, 192.

We are of the opinion that the deed from Alexander Adams, Jr., [48] to his daughters, Peke and Maria, gave them each a fee simple in an undivided half of the land.

F. ANDRADE (LORRIN ANDREWS with him on the brief), for Plaintiffs.

W. F. FREAR and C. H. OLSON (FREAR, PROSER, ANDERSON & MARX and HOLMES & OLSON on the brief), for Defendants.

E. M. WATSON.

RALPH P. QUARLES.

C. W. ASHFORD.

[Endorsed]: No. 879. Supreme Court, Territory of Hawaii. October Term, 1915. Mary Kaleialii, Rebecca Lehia Miles and Annie K. Boyd, and Robert N. Boyd and Victor K. Boyd, by Their Guardian *ad Litem*, Josephine Boyd, v. Henrietta Sullivan, John Buckley and Henry Holmes, Trustee Under the Will of John J. Sullivan, Henrietta Sullivan, John Buckley, Prescilla Alberta Sullivan Clarke, and Robert Kirkwood Clarke, a Minor, Juanita Ellen Clarke, a Minor, and Thomas Walters Clarke, a Minor. Opinion. Filed November 9, 1915, at 9:45 A. M. J. A. Thompson, Clerk. [49]

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et al.,

Defendants.

Notice of Decision on Reserved Question of Law.

ACTION TO QUIET TITLE.

To the Honorable, the Judges of the Circuit Court
of the First Judicial Circuit, Territory of
Hawaii.

You will please take notice that in the above-entitled cause, the Supreme Court has rendered the following decision on reserved question of law:

**“DECISION ON RESERVED QUESTION OF
LAW.**

“In the above-entitled cause pursuant to the opinion of the above-entitled court filed on the 9th day of November, 1915, the deed of Alexander Adams, Jr., to his daughters, Peke and Maria, gave them each a fee simple in an undivided one-half of the land.

Dated, Honolulu, T. H., November 20, 1915.

By the Court:

[Seal] (Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk Supreme Court, Territory of Ha-
waii.

By the Court:

(Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk Supreme Court, Territory of Ha-
waii.

(Endorsed and Filed November 20, 1915.) (No. 879.) [50]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

L. 8032.

R. N. BOYD et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et al.,

Defendants.

Decision.

This cause coming for trial on this day, the Court finds from the *remittitur* in the Supreme Court that the questions heretofore submitted to that court have been decided in favor of the defendants. The Court holds that such question is decisive of this case. Therefore the judgment is in favor of the defendant.

Dated, Honolulu, Hawaii, January 12, 1916.

(Sgd.) T. B. STUART,

Third Judge, First Circuit.

[Endorsed]: L. 8032. Reg. ——. Pg. ——. Circuit Court, First Circuit. R. N. Boyd et al., Plaintiffs, vs. Henrietta Sullivan et al., Defendants. Decision. Filed at 9:55 o'clock A. M. January 12, 1916. B. N. Kahalepuna, Clerk. [51]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

January Term, 1915.

MARY KALEIALII, REBECCA LEHIA MILES,
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE, and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants.

Judgment of Circuit Court, Territory of Hawaii.

ACTION TO QUIET TITLE.

This action by petition claiming an undivided one-half interest in certain lots of land lying and being within the City and County of Honolulu, Territory of Hawaii, particularly set forth and described in said Petition, came to the present term when the parties appeared and were at issue to the Court, jury waived.

Said cause having been heard and committed to the

Court it finds for the defendants and that plaintiffs recover nothing by their said suit.

THEREFORE IT IS ADJUDGED that the defendants recover of the plaintiffs their costs taxed at Eight 50/100 Dollars (\$8.50).

Entered this 17th day of January, A. D. 1916.

By the Court:

[Seal]

(S) B. N. KAHALEPUNA,

Clerk of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

O. K.—L. ANDREWS,

Attorney for Plaintiffs.

[Endorsed]: L. No. 8032. Reg. 4. Pg. 498. Circuit Court, First Circuit, Territory of Hawaii. January Term, 1916. Mary Kaleialii et al., Plaintiffs, vs. Henrietta Sullivan et al., Defendants. Judgment. Filed January 17, 1916, at 9:45 A. M. B. N. Kahalepuna, Clerk. Frear, Prosser, Anderson & Marx, 303 Stangenwald Building, Honolulu, Attorneys for Defendants. [52]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

L. 8032.

MARY KALEIALII et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et al.,

Defendants.

Transcript.**ACTION TO QUIET TITLE.****APPEARANCES:**

LORRIN ANDREWS, Esq., FRANK ANDRADE,
Esq., for Plaintiffs.

FREAR, PROSSER, ANDERSON & MARX,
HOLMES, STANLEY & OLSON, for Defend-
ants.

E. K. DWIGHT, Reporter.

Filed at 8:30 o'clock A. M. March 2d, 1916. B.
N. Kahalepuna, Clerk. [53]

INDEX.

WITNESSES:	D.	C.	RD.	RC.
For the Plaintiff:				
Henry Peters	4-7			
George C. Kopa	7-10			
Mary Kaleialii	10-17	17-19	19-20	20-
Mrs. R. N. Boyd	20-22			
R. D. King	22-30	31-36	36-39	
For the Defendants:				
Mary Kaleialii	30-40			
Geo. C. Kopa	40-44			
George H. Robertson	45-54	55-56		
C. K. Hopkins	56-57			
C. Bolte	57-59			
John Buckley	59-61	61-62		

[54]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

ACTION TO QUIET.

L. 8032.

MARY KALEIALII et al.,

Plaintiffs,

vs.

HENRIETTA SULLIVAN et al.,

Defendants.

Transcript.

ACTION TO QUIET TITLE.

On Wednesday, March 31, 1915, at 10 A. M., the above-entitled cause came on for trial before the Hon. T. B. Stuart, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Lorrin Andrews, Esq., and Frank Andrade, Esq., appearing on behalf of the plaintiffs, and Messrs. Holmes, Stanley and Olson; and Messrs. Frear, Prosser, Anderson & Marx, appearing on behalf of the defendants and the following proceedings were had and testimony taken:

The COURT.—Are you *read* in this case?

Mr. ANDREWS.—Ready for the plaintiff.

Mr. PROSSER.—We ask that the firm of Frear, Prosser, Anderson and Marx be entered of record as assisting the defense.

The COURT.—Let that be entered. What is there in this case?

Mr. ANDREWS.—This is an action to quiet title

brought by Mary Kaleialii, and originally her brother, Robert N. Boyd, but during the litigation he died, and his wife and children, his heirs at law, were substituted in his place by order of Court, so that it is by this brother and sister,—that is, by the heirs of the brother, and the sister, against Henrietta [55] Sullivan, John Buckley, and Henry Holmes, Trustees under the Will of John J. Sullivan; Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke, and Robert Kirkland Clarke, a minor, Juanita Ellen Clarke, a minor, and Thomas Walters Clarke, a minor, these appearing by a guardian *ad litem*, duly appointed by your Honor's predecessor in the case. It is a legal action to quiet title; we have a statutory right to bring it in this jurisdiction.

The complaint reads as follows:

(Mr. Andrews reads Complaint and makes statement.)

The COURT.—Let me understand—the original patentee was Adams Sr. He conveyed to Adams, Jr. Adams, Jr., had two daughters and he conveyed to them by this deed life estates, and it is the children of one of them—it is the children of one of the daughters that bring this suit,—children and grandchildren. How about the other daughter.

Mr. ANDREWS.—The other daughter died; she died a great many years ago, 1890,—and the statute has run; we are not interested in that. We are only suing, of course, for one of the children's interest.

The COURT.—I would like to hear what the de-

fense has,—a statement of the defense.

Mr. OLSON.—If the Court please, the defendants have filed the following answer and plea: (Reads Answer.) As I understand from counsel for the plaintiffs, they claim an undivided half interest in the premises in this proceeding, so it is clear to the Court?

Mr. ANDREWS.—Yes.

Mr. OLSON.—It is merely so it will be clear to the Court that that is the only issue involved. If the Court please, it would perhaps be just as well to state at this time that it will be our purpose here to show to your Honor that the [56] deed in question under which the plaintiff's claim, was not a conveyance of a life estate only to these two children, Becky or Peke and Maria, but that it conveyed the premises in fee simple to the two of them, and that when Peke conveyed her interest to Maria, and Maria subsequently conveyed to the predecessors in title of the defendants here, that a fee simple estate was transferred on through these various parties down to the present defendants, so that contrary to the contention of the plaintiffs, we claim that an estate in fee simple was conveyed by the original deed of Alexander Adams, Jr., to these two people, Peke and Maria.

The COURT.—They claim that under the provisoes, one of those provisoes, that it didn't convey the fee. I would like to have that proviso read again.

Mr. PROSSER.—I think that the questions of law involved in the interpretation of that deed

should be first decided; that argument be heard and the Court make up his mind whether a fee was transferred or simply a life estate, as contended by counsel.

Mr. ANDREWS.—If they admit our case, I will be very glad. We understand that the whole question is the construction of this deed. I told Your Honor yesterday that it was more or less a question of law. The deed is in the Hawaiian language; it naturally has to be translated to the best of our knowledge in English. It really rests with your Honor to construe it as to whether there is—whether we have a case or not.

(Argument.)

Mr. ANDRADE.—Under the circumstances, if the defendants are going to rely on the construction of this deed solely, will they admit that the land in question was a part of the land awarded to the Patentee, Alexander Adams, by the patent and [57] award which we claim.

Mr. PROSSER.—We cannot make any admissions at all. As a matter of fact, we have a number of other defenses besides that.

Mr. ANDRADE.—Which are not set up in your Answer?

Mr. PROSSER.—Yes. I think, if the Court please, in a case like this, it is advisable to let the plaintiff prove their case.

Mr. ANDREWS.—Mr. Peters take the stand.

Testimony of Henry Peters, for Plaintiffs.

HENRY PETERS, sworn as a witness on behalf of plaintiffs, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Mr. ANDREWS.—Your Honor, we have a translation of the deed attached to the complaint, if your Honor cares to see it.

Q. What is your name? A. Henry Peters.

Q. And what is your business, Mr. Peters?

A. Clerk, Land Office.

Q. And as such you have charge of the Land Commission Awards and the royal patents issued by this Government? A. Yes.

Q. Have you with you Royal Patent No. 27, I believe, to Alexander Adams? A. Yes.

Q. Will you open your book please—do you require us to have that read in to the record?

Mr. PROSSER.—No.

Mr. ANDREWS.—Will you admit that Royal Patent 27 includes the land in question—covers the land in question, to Alexander Adams, of course.

Mr. OLSON.—Is that in Hawaiian or English?
[58]

Mr. ANDREWS.—English.

Mr. OLSON.—If the Court please, I can make my objection to it right now, if you want. I object to the introduction in evidence of the Royal Patent on the ground that it does not appear by the evidence sought to be introduced that it covers the land set

(Testimony of Henry Peters.)

forth and described in the complaint or any portion thereof.

(Argument.)

The COURT.—It will be allowed to be introduced; give you an exception.

Mr. ANDREWS.—Will you read it please—I would like to have a typewritten copy made and have that put in.

Q. Who is that royal patent to?

A. Alexander Adams.

Q. And of what land,—give the names of the land please?

A. Land situated in Honolulu, doesn't specify any particular location. It says: all that certain piece of land situate at Honolulu, Island of Oahu, and described by survey.

Q. Now the date of the royal patent is what, please? A. May 21, 1849.

Mr. ANDREWS.—It is agreed between the parties that counsel for plaintiffs instead of reading it into the record, may file a copy of said royal patent.

(Copy of Royal Patent to be marked exhibit "A.")

Mr. OLSON.—Subject to our objection and exception as to the admissibility of the evidence.

The COURT.—What record page is that to be found on?

Mr. ANDREWS.—Vol. 1 of Patents, p. 27; same number as the patent.

Q. Will you tell us briefly what were they getting from the entire patent,—what portion of Honolulu

(Testimony of Henry Peters.)

that land is situated in?

Mr. OLSON.—Object, already asked and answered, and in the second [59] place, the record speaks for itself.

(Argument.)

Mr. OLSON.—We make an admission that it covers the property set forth and described in the royal patent.

Mr. ANDREWS.—Q. And that that is property located on Hotel Street?

A. Well, the survey says so.

Mr. PROSSER.—Then file your survey. All you have to do is to file your copy of the patent.

Mr. ANDREWS.—Q. Have you Land Commission Award book, Mr. Peters, too? A. Yes.

The COURT.—Do I understand that you agree that it covers the property in question?

Mr. PROSSER.—We do not. Our objection to it is on the ground that there is nothing to show that it does, and your Honor let it in and we excepted.

Mr. ANDREWS.—Q. Will you look at Land Commission Award 801?

A. Yes, sir—Alexander Adams.

Q. That is dated when, please?

A. January 29, 1849.

Q. And that is an award of what lands, Mr. Peters, until you get the description by metes and bounds?

Mr. OLSON.—Subject to the same objection that we made to the admissibility of the Royal Patent, it will be admitted by defendants that the Land

(Testimony of Henry Peters.)

Commission Award, concerning which the witness is now being questioned, describes the same—is the same description of land as the description in the royal patent, which will be supplied later by typewritten copy.

Mr. ANDREWS.—That is all Mr. Peters; it being understood that either or both can be offered in evidence or are offered in evidence subject to our filing a typewritten copy. [60]

Mr. PROSSER.—Do you offer them both?

Mr. ANDREWS.—Yes.

Mr. PROSSER.—Then we make the same objection to the admissibility of that that we did to the admissibility of the royal patent.

The COURT.—Same ruling, same exception.

(Copy of L. C. A. to be marked Plaintiff's Exhibit "B.")

Mr. ANDREWS.—That is all; call Mr. Kopa.

Testimony of George C. Kopa, for Plaintiffs.

GEORGE C. KOPA, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. What is your name? A. George C. Kopa.

Q. What is your business, Mr. Kopa?

A. Deputy in the Record Office of the Territory of Hawaii.

Q. And have you in your custody and control the record of all conveyances filed in your office.

A. Yes, sir.

(Testimony of George C. Kopa.)

Q. Have you with you Liber 4? A. I have.

Q. Turn to page 214, and tell me what deed you find on that page, Liber 4.

A. I find a deed made by Alexander Adams, to Alexander Adams, Jr.

Q. Dated what date, please?

A. Dated the 22d day of June, 1850.

Q. Is it in English or Hawaiian?

A. In English.

Q. Will you please read the deed,—we offer it in evidence.

Mr. PROSSER.—To expedite matters, can't it be stipulated that counsel will furnish copies of these documents. The proper way is to come here prepared with certified copies that they are going to use; not to take up the time of the Court in reading this into the record. [61]

Mr. ANDREWS.—The short way is to offer the originals. If they are allowed, then we will offer the typewritten copies.

Mr. OLSON.—It is so short that it might as well be read. We object to it on the ground, on the same ground that was offered before as to the admissibility of the royal patent and the land commission award.

The COURT.—Same ruling, same exception.

Mr. ANDREWS.—Read it, please.

Deed, June 22, 1850, Alexander Adams to Alexander Adams, Jr.

A. (Reading:)

“Know all men, that I, Alexander Adams, of

(Testimony of George C. Kopa.)

Oahu, Hawaiian Islands, have given and by these presents do give, grant, devise and bequeath to my son Alexander Adams, Jr., his heirs, executors, administrators or assigns, all my right and title to a certain portion of my land allotment in the town of Honolulu, described as follows: Commencing at John Duke's house along the Street SE. by E. $\frac{1}{2}$ 46 feet 6 in., thence NE. $\frac{1}{2}$ N. 62 feet, thence NW. by W. 44 feet and thence SW. $\frac{1}{2}$ W. 72 feet to the place of commencement.

TO HAVE AND TO HOLD by him, his heirs, executors, administrators or assigns for his or their own proper use and benefit forever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 22d day of June, in the year 1850."

Mr. OLSON.—In order to diminish the record, we will admit that it is shown to be properly acknowledged; there is no necessity of reading the acknowledgment in the record.

WITNESS.—Signed Alexander Adams, in the presence of James Ruddack and Andr. Auld, witnesses. Acknowledged on the 22d day of August, 1850, before Asher M. Bates, Registrar of Conveyances. Recorded on the 22d day of August, 1850, at 12 o'clock noon.

Mr. ANDREWS.—Q. Now, Mr. Kopa, have you got with you Vol. 11, Conveyances, Liber 11?

A. Yes, sir. [62]

Q. Will you turn to page 75 and tell me what you find there?

(Testimony of George C. Kopa.)

Mr. OLSON.—You have an exact copy of that deed attached to the complaint.

Mr. ANDREWS.—Yes. I just want to get it in evidence, that's all.

A. I find a deed made by Alexander Adams, Jr., to Peke and Maria, dated September 15, 1858.

Mr. ANDREWS.—Will counsel now admit that exhibit "A," attached to the amended complaint, is a correct copy of that deed in Hawaiian?

Mr. OLSON.—Yes, we will admit that.

Mr. ANDREWS.—Then, your Honor, we offer this deed in evidence and ask leave to use for the purposes of this case, the exhibit "A" attached to the complaint, which is admitted to be a correct copy of the deed, instead of reading the deed into the record.

Mr. OLSON.—To which offer we will make the same objection on the ground of materiality; and that it is not shown that it is any part of the land set forth or described in the complaint.

(Argument.)

The COURT.—Overruled; excepted to.

(Received and marked Plaintiff's Exhibit "D.")

Mr. ANDREWS.—Is it now admitted—do you wish to admit the correctness of our translation or not?

Mr. OLSON.—I think it is practically correct.

Mr. PROSSER.—I think we will admit the correctness of the translation of the deed attached to the complaint.

Mr. OLSON.—It will be stipulated that the translation attached to the complaint,—the amended com-

(Testimony of George C. Kopa.)

plaint, as exhibit "B," is a correct translation of the deed, a copy of which is attached to the amended complaint as exhibit "A." [63]

Mr. ANDREWS.—And which is the same deed which has been offered in evidence in Liber 11, page 75, of Conveyances?

Mr. OLSON.—Yes.

Mr. ANDREWS.—That is all, Mr. Kopa, thank you. Now, Mrs. Kaleialii, you take the stand, please.

Testimony of Mary Kaleialii, for Plaintiffs.

MARY KALEIALII, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Mr. ANDREWS.—Do you wish to speak Hawaiian on the stand or not?

A. I think Hawaiian is better for me.

Mr. OLSON.—She speaks English well.

Mr. ANDREWS.—I think the witness has a right—

Mr. OLSON.—If the Court please, it is going to take more time. When the time arrives, and it appears that the witness is having difficulty with the English language, we can get in the Interpreter. Until that time appears, it is going to be more satisfactory to every one to have her go on in the English language.

The COURT.—Let the Interpreter take a seat and watch her.

(Testimony of Mary Kaleialii.)

Mr. ANDREWS.—Q. Mrs. Kaleialii, you are one of the plaintiffs in this action? A. Yes.

Q. You are bringing this action, you understand?

A. Yes.

Q. And who was your father and who was your mother? A. My mother was Peke Stone.

Q. And who was your father?

A. Ed. Boyd,—I cannot really say.

Q. There is some question as to whether it was Mr. Stone or Mr. Boyd? [64] A. Yes.

Q. Who was the father of your mother?

A. Alexander Adams, Jr.

Q. And do you know who his father was—who was the father of Alexander Adams, Jr.?

A. Captain Adams.

Q. And what was his first name?

A. Alexander Adams.

Q. Did your mother have any children besides yourself? Myself and Robert.

Q. And what was he called—he is living or dead, your brother? A. He is dead.

Q. And when did he die?

A. Died in the month of September, but the day I cannot remember.

Q. The month of September last year?

A. Yes.

Q. Now, is your mother living or dead?

A. She is dead.

Q. And Alexander Adams, Sr., is he living or dead? A. Jr.?

Q. Alexander Adams, Jr.? A. He is dead.

(Testimony of Mary Kaleialii.)

Q. When did your mother die?

A. She died at my home.

Q. When did she die?

A. She died on the 5th of July.

Q. Last year? A. Yes.

Q. Now, did Alexander Adams, Jr., die before your mother or after your mother? A. Before.

Q. How long before, do you remember?

A. I can't remember.

Q. It was a long time? A. Long time.

Q. Now, did Alexander Adams, Jr., have any children besides your mother? A. Only two. [65]

Q. Who was the other one? A. Maria Boyd.

Q. And is she living or dead? A. Dead.

Q. Did she die before or after your mother?

A. She died before my mother.

Q. Now in Hawaiian language, what would be your mother's name—how would she spell it? A. Peke.

Q. Do you know how to spell it? A. P-e-k-e.

Q. And her sister, what was her name—her first name? A. Maria.

Q. And that would be written in Hawaiian the same as it is in English, or not? A. Malaea.

Q. Would be the same, or different?

A. In Hawaiian it would be Malaea—in English it would be Maria.

Q. Now, did Alexander Adams have any other children besides Peke and Maria? A. No other.

Q. Up to the time of his death? A. Yes.

Q. And where did your mother die—where was she when she died—where was your mother living when

(Testimony of Mary Kaleialii.)

she died? A. She was living with me.

Q. In Honolulu? A. In Honolulu.

Q. Now did you know Alexander Adams during his lifetime—did you know your grandfather? [66]

Mr. OLSON.—Object to that, assumes something that is not yet proven—that this Alexander Adams is her grandfather.

(Argument.) Withdraw the objection.

Mr. ANDREWS.—Q. Did you know your grandfather during his life, Alexander Adams? A. Yes.

Q. Where did he live? A. At Kaalaa.

Q. Where is that? A. Up Pauoa.

Q. Do you know a place known as Adams Lane in Honolulu—now known as Adams Lane? A. Yes.

Q. Where is that in connection with Hotel Street in Honolulu?

A. The Young Hotel is right makai side, then comes Hotel Street, and then there is a small road which runs up from Hotel Street, that is Adams Lane.

Q. Now, that property that is—that we spoke of, that Hotel Street is makai of and Adams Lane is on one side of—do you remember who had possession of that property during the life of Alexander Adams, Jr.?

Mr. OLSON.—Object, incompetent, irrelevant and immaterial; having no bearing on any issue in this case.

(Argument.)

Mr. ANDREWS.—Q. Who was in possession of that property, the property which she describes as

(Testimony of Mary Kaleialii.)

being mauka of the Young Hotel, where the Young Hotel now is, and bounded on one side by what is known as Adams Lane?

Mr. OLSON.—She hasn't described any property being there—she simply said Adams Lane ran off of Hotel Street mauka of the Young Hotel—she hasn't said anything about any property.

Mr. ANDREWS.—Q. I asked her who had possession of that property—mauka of the Young Hotel—do you remember who had [67] possession of that during Alexander Adams' life?

Mr. OLSON.—Same objection and exception.

A. Alexander Adams.

Q. And do you know where Union Street now is?

A. Yes.

Q. And Hotel Street? A. Yes.

Q. And the property between what is known as Adams Lane and Union Street now, on the mauka side of Hotel Street, do you remember in whose possession that property was during the lifetime of Alexander Adams?

A. I knew—Alexander Adams' property there.

Q. Did you know Alexander Adams, Sr., at all Captain Adams? A. Captain Adams?

Q. Yes, Captain Adams, did you know him?

A. Yes.

Q. Where did he live?

A. He lived right next to Alexander Adams place, just about by the next side—in the same place.

Q. Now where is the property that Captain Adams

(Testimony of Mary Kaleialii.)

lived in now—what is on that property now, where Captain Adams lived?

A. I couldn't tell you, because I do not know who is on it. I do not know who is in possession there.

Q. What was Alexander Adams Jr. doing to this property that was near Hotel Street during the time that he had it?

A. We all lived there—that was our home.

Q. And how long was that your home—how long—for how many years did you live on this property that you have spoken of as your home, between Adams Lane and Union Street and what is now Hotel Street?

Mr. OLSON.—Object to that, if the Court please—assuming [68] facts not in evidence.

(Argument.)

The COURT.—It is claimed that this tends to prove the issues—I don't know whether it does or not. I am mixed on all of those times and I am ignorant of them—I presume counsel is going forward in good faith—I do not know. Therefore I shall have to overrule your objection at this time and give you an exception.

A. We used to live there with our parents, and when we were tired of living down there, we used to go up Pauoa—we were changing back and forth all the time. We were raised up there from children, all of us children were brought up there.

The COURT.—Ask her if she can answer as to the number of years.

A. I couldn't tell you the number of years it is; we lived there a long time.

(Testimony of Mary Kaleialii.)

Q. Now did you know the property that the old Captain Adams gave to his son Alexander Adams there on Hotel Street, what is now Hotel Street—do you know that property?

Mr. OLSON.—Object, assumes something not in evidence, therefore it is immaterial; does not tend to prove any of the issues in this case; attempting also to prove something by this witness—the deed is the best evidence; it is the offer of secondary evidence.

(Argument.)

The COURT.—That is not what your question was, Mr. Andrews; now put it again.

Mr. ANDREWS.—Q. Did you know of Captain Adams giving some property to your grandfather, Alexander Adams, Jr., on Hotel Street or what is now Hotel Street?

A. Yes.

Q. Now that property—what was done with that—what did [69] your grandfather do with that property which his father gave him?

A. We stayed there.

Q. Was there a house on it?

A. There was a house, and we used to live there, with my sisters and brothers and the whole family.

Q. Can you tell us about where it is now, describing the present surroundings, the different buildings that are there, can you tell us in relation to the present buildings, where that house was?

A. It is on the Ewa side of Steiner's stone building.

Q. That is the building on Hotel Street now?

A. Yes.

(Testimony of Mary Kaleialii.)

Q. And was Hotel Street cut through at that time—at the time that Alexander Adams gave this property to his son, Alexander Adams, Jr.?

A. No.

Q. Now when you say “we stayed there”—tell us who stayed there—who do you mean by “we.”

Q. My grandfather, our parents, and we children.

Q. Well now, you say your grandfather is Alexander Adams, Jr.? A. Yes.

Q. Who do you mean by “our parents”?

A. Peke and Maria.

Q. And you mean by grandfather—yours and your brother’s and Maria’s children’s? A. Yes.

Q. How long ago do you remember that you—withdraw that—you are not living there now, are you?

A. No.

Q. How long ago that you last lived there, do you know—any of your family?

A. We all got married and each one went away—we got married and each one went away.

Q. Then you have not lived there since your marriage? [70] A. No.

Mr. ANDREWS.—That is all.

Cross-examination of MRS. MARY KALEIALII.
(By Mr. PROSSER.)

Q. Mrs. Kaleialii, how long ago were you married?

A. What do you mean, the first—how long was it I was married—from my first husband to this one?

A. Yes.

Q. I have forgotten how it is, it has been so long

(Testimony of Mary Kaleialii.)

that I have forgotten the time.

Q. And you were married to him in Honolulu, were you? A. I was married at Heeia Plantation.

Q. About how old were you when you were married the first time? A. I was 19.

Q. And at the time that you were married, were you married as Maria Stone or Maria Boyd?

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial, not proper cross-examination.

The COURT.—Let it be answered; exception given.

A. Boyd.

Q. And you had always been known as Maria Boyd in your family had you not?

Mr. ANDREWS.—Objected to on the same ground; incompetent, irrelevant and immaterial; not proper cross-examination.

The COURT.—Overruled and excepted to.

A. Not Maria, but Mary Boyd.

Q. Do you remember Mr. Stone at all?

A. I do not.

Q. And Mr. Stone was your mother's husband, was he not? A. He was. [71]

Q. And Mr. Boyd never was married to your mother?

Mr. ANDREWS.—We object; incompetent, irrelevant and immaterial; not proper cross-examination.

(Argument.)

Mr. PROSSER.—Are you willing to admit for the purpose of this suit that Mr. Boyd was her father?

(Testimony of Mary Kaleialii.)

Mr. ANDREWS.—No, but that is immaterial.

Mr. PROSSER.—It is extremely material upon the legal interpretation of the deed before this Court.

(Argument.)

The COURT.—Let the question be answered.

Mr. ANDREWS.—Exception.

A. No.

Q. Was Robert Boyd that you speak of, older or younger than you? A. Much younger than I am.

Q. And where was Mr. Stone at the time of the birth of Robert? A. He was away.

Q. And how long had he been away?

A. That I couldn't tell you.

Q. Well, I mean a number of years or a short time?

A. I never knew him—I heard about him and that was all.

Q. Who was the father of Robert?

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial; hearsay. It is certainly not cross-examination.

(Argument.)

The COURT.—You have got the Court in a place where he does not know what to do. I am going to allow it *go to* in and give you an exception, and if I am wrong about it—when you come to argue this case, why I shall certainly not consider anything that is not relevant.

Mr. ANDREWS.—We except, if the Court please.

The COURT.—Let it go in and you have your exception. [72]

(Question read.)

(Testimony of Mary Kaleialii.)

Mr. ANDREWS.—That is, of course, if she knows.

The COURT.—Yes, if she knows.

A. Mr. Boyd.

Q. Ed. Boyd? A. Yes.

Mr. PROSSER.—That is all.

Mr. OLSON.—Just a moment, before you close—may I ask an additional question to save time?

Q. How much older were you than Robert Boyd—how many years older—about how old were you when he was born, 10 or 12 years old?

A. I think I was between eight and nine.

Q. Eight or nine years old—do you remember the time he was born?

A. Yes, I remember the time he was born.

Q. Now, had Mr. Stone been here in Honolulu for say three or four years before that?

The COURT.—She has answered that three or four times—she didn't know him.

Mr. OLSON.—That is all.

Redirect Examination of Mrs. MARY
KALEIALII.

(By Mr. ANDREWS.)

Q. What do you know of Robert's birth—who was Robert's father, is simply from hearsay, is it not?

Mr. OLSON.—Object, on the ground that it is a leading question. (Argument.)

The COURT.—I want you to ask leading questions. That question will stand. [73]

A. From hearsay.

Mr. ANDREWS.—That is all.

(Testimony of Mary Kaleialii.)

Recross-examination of Mrs. MARY KALEIALLI.

(By Mr. PROSSER.)

Q. You heard that, did you not, from the members—from your mother and members of your family, did you not? A. From his mother.

Q. From whose mother?

A. From his mother.

Q. Robert's mother? A. Yes.

Mr. PROSSER.—That is all.

Mr. ANDREWS.—That is all.

Testimony of Mrs. Robert N. Boyd, for Plaintiffs.

Mrs. ROBERT N. BOYD, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. Mrs. Boyd, your husband—you are a widow now, are you not? A. Yes.

Q. And your husband's name was what?

A. Robert Napunako Boyd.

Q. And do you know what relation he was to Mrs. Kaleialii that just went on the stand?

A. Yes.

Q. What was his relation to her?

A. Brother.

Q. When did Robert, your husband, die, Mrs. Boyd? A. September 9, the year 1914. [74]

Q. And where were you married to Mr. Robert Boyd?

A. Right here in Honolulu, Auwaiolimu, Pauoa.

Q. By whom?

(Testimony of Mrs. Robert N. Boyd.)

A. By Bishop Wallace of the St. Andrews Cathedral.

Q. Episcopalian minister, Mr. Stanley says,—did you have any children by your marriage with Mr. Boyd? A. Yes.

Q. Now, will you please give their names and ages, of your children?

A. Rebecca Leahia Boyd.

Q. How old is she about? A. 24.

Q. And is she married? A. Yes.

Q. To a Mr. Miles? A. T. T. Miles.

Q. Then the next child?

A. That is Annie K. Boyd.

Q. How old is she? A. Twenty.

Q. And the next? A. Robert N. Boyd.

Q. How old is he? A. Eighteen.

Q. And the next?

A. Victor K. Boyd.

Q. How old is he?

A. Fifteen, in a month's time, sixteen.

Q. And those children that you name, Rebecca, Annie, Robert and Victor, they are each living?

A. Yes.

Q. And they are the only children?

A. The only children.

Q. Have you any children who have died?

A. No.

Q. Before he married you, do you know whether your husband was ever married before? A. No.

Q. You know he wasn't married?

A. He wasn't married.

(Testimony of Mrs. Robert N. Boyd.)

Q. Now, when your husband died, did he leave any will? [75] A. No.

Mr. ANDREWS.—That is all.

Mr. PROSSER.—No questions.

Mr. ANDREWS.—That is all, thank you, Mrs. Boyd. We have only one more witness, your Honor, and he is not present. He is a surveyor. May we have five minutes recess?

The COURT.—Yes.

(Recess.)

Mr. ANDREWS.—If the Court please, the surveyor in calling my *attention the* survey, has pointed out an error, and I see by the original complaint that it is a clerical error. The third course in our amended complaint, “44° 30' 63.7 feet to the new line of Hotel Street,” should read 53.7 instead of 63.7.

Mr. OLSON.—We have no objection to the amendment of the amended complaint, so it will be 53 instead of 63.

(Amended complaint corrected.)

Testimony of Robert D. King, for Plaintiffs.

ROBERT D. KING, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. Your name, please.

A. Robert D. King.

Q. Mr. King, what is your business?

A. Surveyor.

Q. And how long have you been a surveyor?

(Testimony of Robert D. King.)

A. About ten years.

Q. Connected at present with what office?

A. Territorial Survey Department. [76]

Q. Did you make the description—I hand you the description of the premises on page 2 of the amended complaint, which has been amended by changing 63 to 53,—did you make that description by metes and bounds prior to the beginning of this suit?

A. I made it about three years ago.

Q. That was your survey?

A. Yes, my description.

Q. Now will you just describe where that property is and is near—

A. Perhaps I had better explain how I wrote the description.

Q. If you will.

A. Judge Andrade handed me a copy of the deed and asked me to write the description below the bare description of it to more properly locate the land described in this deed, and studying the records and government survey maps on file in our office, I drew up the description as you have it there.

Q. Now, will you tell us where that property is now?

Mr. OLSON.—Object, on the ground that no foundation has been laid; it has not even been shown what property he surveyed.

(Argument.)

Mr. ANDREWS.—All right—will you tell me please, accepting the suggestion of counsel on the other side, from what deed you made the first,—you

(Testimony of Robert D. King.)

first made this investigation?

A. I haven't got the one handed to me by Judge Andrade, but I made a copy of it in my records. It is a deed from Alexander Adams to Alexander Adams, Jr., dated June 22, 1850. Doesn't state whether it is recorded in my memorandum.

Q. And did you look up the royal patent and the land commission award to Alexander Adams, Sr.?

[77] A. I did.

Q. When making your investigation?

A. I didn't bother going into the royal patent, I just examined the L. C. Award.

Q. And is this property that you made the description of covered by the award in question?

Mr. OLSON.—Object, on the ground that it is not the best evidence. It is a question of law.

(Argument.)

Mr. ANDREWS.—Q. Do you know where the property is that was comprised in the Land Commission Award?

A. From the records on file in the Government Survey Office.

Q. You looked them up?

A. Yes, the description of the award, and as it is located on our maps.

Q. Have you the map here? A. Yes.

Q. That is the original survey map?

A. It is an original map, not the original survey of the award, though.

Q. No, I mean the original map—will you show us on this map where this property is located?

(Testimony of Robert D. King.)

A. I will show you where the award is. (Witness shows.)

Q. Let us have that again?

A. This map shows the award to Alexander Adams, Sr., on Hotel Street between Adams Lane and Union, and shows the entire award as originally given to Alexander Adams.

Q. And is marked how on this map?

A. Marked L. C. A. 801, A. Adams.

Q. Now, will you please show us where the description of the property is, in regard to this property?

A. Well, this description you can see is rather indefinite. It says: "Commencing at John Duke's house along the street [78] SE. by E $\frac{1}{2}$ 46 feet 6 inches, thence NE. $\frac{1}{2}$ N 62 feet thence NW. by W 44 feet and thence SW. $\frac{1}{2}$ W 72 feet to the place of commencement." Now, the only thing I had to identify this description in connection with the Adams award was that fact that it was supposed to be a portion of Alexander Adams' property, or from Alexander Adams to somebody else, and refers to John Duke's house. Now John Duke,—this map shows also an award to John Duke and wife,—

Mr. OLSON.—Now if the Court please, I object to the witness testifying in regard to any property owned by John Duke as shown on this map on the ground that that is hearsay evidence; the witness does not testify of his own knowledge at all.

The COURT.—We are trying to get a starting point.

WITNESS.—That is the hardest thing to do.

(Testimony of Robert D. King.)

The COURT.—I will overrule your objection. Go on now.

Mr. OLSON.—My objection is that it is calling for hearsay testimony; testimony not within the witness' own knowledge.

(Argument.)

The COURT.—Overruled and excepted to. Now, go on.

WITNESS.—To identify this description I had to get—the point of commencement refers to John Duke's house, and I had to know where Alexander Adams kuleana was. There is a reference to a monument, survey monument, John Duke's house at that time. In taking this map here, it shows the award to Alexander Adams, and the award to John Duke, and the map also shows a house on there,—

Q. On there, meaning John Duke's?

A. John Duke's award. So I adopted that as the initial point of this survey here; and of course it is described by points of the compass, and I reduced that to degrees of the circle. I plotted that survey on this map here, and it [79] fits very closely to the fences and other buildings as shown on this map (pointing).

The COURT.—What fences and other buildings?

A. Fences along here (pointing).

Q. Along whose property?

A. On a portion of the Adams award.

Mr. OLSON.—I move to strike the testimony of the witness relating to the location of the Duke premises and the Duke house, on the ground that it is hear-

(Testimony of Robert D. King.)

say testimony; not within the knowledge of the witness himself, and based entirely upon a map which is not in evidence,—which is not the best evidence.

(Argument.)

The COURT.—The witness is speaking from a Territorial map and it is not to be classed as hearsay evidence. Objection overruled.

Mr. OLSON.—Note an exception.

Mr. ANDREWS.—Q. Did you make any other investigations besides the maps, as to the John Duke house?

A. I looked up the description of survey in the award to John Duke. I do not recollect just now, it is three years ago since I wrote that,—I do not recollect just whether I saw that house on the original award or not. But my recollection is that there was something there, that house. These original awards had sketch plans attached to them, and they had such details as houses, or ditches or fences, or anything like that.

Mr. OLSON.—I move to strike the evidence of the witness in response to the last question, on the ground that it is hearsay entirely, and is not the best evidence.

(Argument.) [80]

The COURT.—I think that this tends to prove the issue, and it may go in. I do not know how conclusive it will be,—I am not talking about the weight of the evidence. The question is does it tend that way. The motion will be overruled.

Mr. OLSON.—Exception.

(Testimony of Robert D. King.)

The COURT.—This map, as I understand,—it is a map now in the Territorial Office? A. Yes.

Q. Official map?

Mr. ANDREWS.—There is always difficulty in offering these maps in evidence. They won't allow them outside of the office. We have here a map which was made by Mr. King, but I believe—

The COURT.—Is it a copy?

WITNESS.—It is a tracing of a portion of this map.

Mr. ANDREWS.—And Mr. King can on that identify the same premises,—if you have no objection.

Mr. OLSON.—I object to the map being introduced in evidence, having no objection to the substitution of the tracing of the map. It is a difficult thing to put these official maps in the record and taking them out of the archives, if it is an official map,—but I object to the offer of the map if it is offered in evidence.

The COURT.—You object to the original, but you do not object to that being substituted?

Mr. OLSON.—I object to the map on the ground that there is no evidence showing that this is the official map; no evidence whatever that it is a map of any of the premises involved in the issues of this case. No evidence whatever that it is a map, a true map, or an official map of any of the premises described in the complaint or involved in this case, or [81] any premises bearing upon the issues involved in the case.

The COURT.—I understood the witness to say that

(Testimony of Robert D. King.)

this is an official map; it is kept in the office of the Registrar.

Mr. OLSON.—It is to be borne in mind that it is an official map only because the law makes it so.

(Argument.)

The COURT.—If it is kept in the Survey Office of the Territory and used as an official map, I would not go back farther than that to inquire whether the man who made the map knew what he was doing or not. I would simply stop right there. I think that is sufficient until the map is successfully assailed. Now I have your objection to that,—as to the map itself, and I have overruled that, but you do not object to this copy being put in. It will be allowed to be introduced.

Mr. OLSON.—No. I wish to add to my objection that it is not the best evidence, and hearsay.

(Map received and marked Plaintiff's Exhibit E.)

Mr. ANDREWS.—We have offered this map in evidence, and offer it by number also.

WITNESS.—Registered Map 1387.

Mr. OLSON.—At this time, in view of the fact that we have consented to the substitution of this tracing in place of the other map, I wish to stipulate that if it becomes important in our opinion to have the original map referred to either in this court or on appeal, that we shall have permission to have it produced before the Court at which the issue arises?

Mr. ANDREWS.—No objection to that.

WITNESS.—I want to call attention to the fact that there are things on this that are not on the official map.

(Testimony of Robert D. King.)

Mr. PROSSER.—Is there anything on that map about the line of [82] Hotel Street? A. Yes.

Mr. ANDREWS.—Q. Well take up the big map and we will discuss the tracing, Mr. King, if you please? Now the description that you made, Mr. King, of the premises which you have identified as being the same in the complaint,—will you indicate that on this tracing by the letters a, b, c, d, or more if you have to,—just the boundaries.

A. I will shade it in in pencil.

Q. Well, shade it in in pencil, if you will please?

A. (Witness writes.)

Mr. OLSON.—I suggest that that be further identified by the letter X, not only the pencil lines of the lot that he has just shaded with pencil.

Mr. ANDREWS.—Q. Now I take it Mr. King that that—

Mr. OLSON.—In order to eliminate the necessity of repeating my objection in each case, I ask that counsel stipulate that my objection to this witness' testimony already interposed will be allowed to stand to his whole line of examination with reference to these premises and any testimony from this map which was just introduced in evidence, and will the Court allow me an exception.

Mr. ANDREWS.—We have no objection.

The COURT.—Yes, I will allow you to do that.

Mr. ANDREWS.—Now I hand you again page 2 of the complaint beginning at a point reading: “Beginning at a point,” and finishing, “area 2220 square feet,”—do I understand that that is correctly de-

(Testimony of Robert D. King.)

scribed on this tracing by your shaded—in portion?

A. Yes, approximately as you can make it upon a tracing. Covers the land I intended to describe in that description. [83]

Q. Now Mr. King,—now then, let us—will you again repeat, Mr. King, what was the deed that you got, so there will be no questions, from Judge Andrade, and from which you made this description as you tell us, and which is now apportioned on the tracing?

A. It is a deed from Alexander Adams of Oahu, to Alexander Adams, Jr.

Q. Dated when?

A. June 22, 1850,—that is the copy I made from the deed Judge Andrade handed me, made for my own use.

Q. Do you know what book of conveyances that was registered in?

A. I have no memorandum of that.

Q. That is all—Now that property is situated where, as between Hotel Street, Adams Lane and Union Street at the present time?

A. Situated on the mauka side of Hotel Street, the initial point of the survey being, according to my description, 137.6 feet from the east corner of Hotel and Union Streets, southeast.

Q. And then running in what direction from Union Street from the point near Union Street?

A. Southeast.

Q. Towards Adams Lane?

A. Towards Adams Lane,—a portion of this L. C.

(Testimony of Robert D. King.)

A. 801 to Adams, shown in the government survey.

(Adjourned until 2 P. M.) [84]

Cross-examination of ROBERT D. KING.

(By Mr. PROSSER.)

Q. Mr. King, I understand that in getting at your description of this property contained in the complaint, you used this copy of a deed from Alexander Adams Jr., to Peke and Maria, dated the 15th day of September,—I will change that question—did you refer to the deed from Alexander Adams Jr., to Peke and Maria dated the 15th day of September, 1858?

A. No, sir.

Q. Did not at all? A. No, sir.

The COURT.—What deed is that?

Mr. PROSSER.—The deed which they rely upon is contained as an exhibit attached to the complaint marked exhibit “B”; that is a translation of it to which we are referring at this time, from Alexander Adams Jr., to Peke and Maria. I am asking him if he considered the description attached to that deed in getting up the description: “Commencing at John Duke’s house along the street SE. by E. $\frac{1}{2}$ 46 feet 6 inches, thence NE. $\frac{1}{2}$ N. 62 feet thence NW. by W. 44 feet and thence SW. $\frac{1}{2}$ W. 72 feet to the place of commencement,”—that is the description.

WITNESS.—I never saw any such deed. All I had was that one deed from Alexander Adams to Alexander Adams, Jr.

Mr. PROSSER.—Q. Now take the copy of the deed attached to the complaint here—I will ask you if you can, on your map there, point out the place of

(Testimony of Robert D. King.)

commencement of the survey? Now the description contained in this deed is as follows: "Commencing at John Duke's house,"—where is John Duke's house?
[85]

A. Why, I took it to be this corner here (pointing).

Q. Where is John Duke's house?

Mr. ANDREWS.—I submit he has answered it; he has marked it on the map.

Mr. PROSSER.—Q. Is there anything to indicate either on that map or any other map, where John Duke's house is located?

A. Why as I explained in my other evidence that I arrived at the conclusion that that was possibly John Duke's house from the fact that that is an award to John Duke; and the award sets forth in its preamble,—“house lot of John Duke.”

Q. Then did you start at a point in John Duke's house, or did you start at a point in John Duke's property?

A. Do you mean the description there?

Q. Yes.

A. I should have stated that the description in that complaint is only a portion of the land as described in that deed. I have compiled two descriptions, one of the portion within Hotel Street, and one of the balance of the lot.

Q. Will you point out on this map John Duke's property?

A. Right here, enclosed by these red lines, and marked L. C. A. 5527 to John Duke.

Q. And on what portion of that entire tract of

(Testimony of Robert D. King.)

property was John Duke's house located?

A. Well as I say, there—

Q. Do you know?

A. I never saw the house there.

Q. Is there any map which shows the location of John Duke's house?

A. Yes,—this map shows the location of a house that I take to be John Duke's.

Q. Where does it show the house to be located?
[86]

A. In one portion of the John Duke award.

Q. In what portion? A. Southeast corner.

Q. Will you indicate on that map the location of John Duke's house?

A. It is here (pointing).

Q. As shown on the map? A. Here shown.

Q. Do you understand the distinction between a house and a lot that size—do you pretend to say the whole?

A. No, it wasn't the size—that is, it is not covering the whole kuleana. That is a surveyor's mark for house,—black lines with these lines running from it.

Q. Then according to that survey it only had three sides? A. This side isn't marked here.

Q. Will you make a mark upon that map which will indicate the location of this house?

A. Take these little lines in pencil.

Q. Now, at what part of that house did you start?

A. Started at the southeast corner.

Q. Why did you start there?

(Testimony of Robert D. King.)

A. That joins on the map the boundary of the Adams kuleana.

Q. That isn't called for by any description here contained in this deed,—the description of the deed is as follows: Commencing at John Duke's house along the Street SE. by E. $1\frac{1}{2}$ 46.6 feet,—can you point out the place of commencement under that description?

A. Yes. That is the point I adopted (pointing). A man cannot do any more than he knows, so I got the initial point of beginning between Adams and John Duke which intersects the southeast corner of that house approximately,—the only one you could have used. [87]

Q. In other words, no accurate statement of a point of beginning is contained in that deed,—it isn't there, is it?

A. Well, I don't know as you could get anybody that can make any more accurate description with a survey by a surveyor's compass.

Q. I will ask you if you can by that description show us where it is located on this map?

A. Well, I would say that I read that description over, and I adopted that from all the different data that I could get hold of, and used that as—that corner as the initial point.

Q. You did that irrespective of anything that was said in the deed itself,—just followed that arbitrarily?

MR. ANDREWS.—Object to that, the testimony

(Testimony of Robert D. King.)

not being to that effect at all.

(Argument.)

The COURT.—Objection overruled.

Mr. ANDREWS.—Exception.

A. Well, I have explained to you time and time again through these surveys here. You can see yourself that it is rather an indefinite description. You cannot take the description and just in this way, without getting some other corroborative information. I used the original award of John Duke and the award of Alexander Adams and our Government survey map, and decided in my own mind that that was very probably the corner of the initial point of that survey. Then I took these compass bearings and reduced them to degrees of the arc and plotted them and allowed for the variance of that deed, which was nine degrees and twenty minutes declination; fitted them up on the bearings and they fitted on our Government survey map by bearings and distances so very closely that there was no doubt in my mind that it was the intention of the man in that deed. I don't think [88] I can explain any further to you.

Q. To our mind the deed conveys the property that is described in the deed, and that is all that it does convey, and I am trying to get away from any proposition of guess work or anything else. Now, in order to properly locate a piece of property, you have to have a point of beginning? A. Yes.

Q. Is there any definite point of beginning stated in that deed? A. Why, John Duke's house.

Q. That is the point of beginning, isn't it?

(Testimony of Robert D. King.)

A. Yes, John Duke's house, along the street.

Q. On which side of John Duke's house?

A. I took it to be on the—

Q. Is there anything in this deed which shows which side of the John Duke house is the point of beginning? A. No.

Q. Is there anything to show that it was any other part of John Duke's house. A. No.

Q. So far as this description is concerned, it might have started anywhere within the distances set forth in the deed?

A. The other courses govern, too. This begins at the corner of John Duke's house,—and I took it to be this corner (pointing); then it runs southeast a certain distance; it doesn't run this way (pointing); if it did,—if it commenced on this side (pointing) of John Duke's house, it would have to run southeast that way (pointing); it would not run this way southeast that way (pointing); it would not run this way (pointing).

Q. Supposing it started, we will say, at this corner (pointing) over here, and ran southeast as referred to in this deed, where would it come out? [89]

A. That corner is along the street. You have two points that govern, John Duke's house and the street; then he ran southeast.

Q. Supposing it began here? (pointing).

A. Well, it would go in the same direction, only it would include a portion of John Duke's property, and I don't think that Adams would deed a portion of land that didn't belong to him.

(Testimony of Robert D. King.)

Q. So far as deeding property that didn't belong to him, that is a matter of conclusion? A. Yes.

Q. Then dependent upon what corner of John Duke's house you took, your survey is correct or incorrect? A. Yes.

Mr. PROSSER.—That is all.

Redirect Examination of ROBERT D. KING.

(By Mr. ANDREWS.)

Q. Now, Mr. King, just one question,—as I understand it you took the intersection of John Duke's property with the Alexander Adams property?

A. Yes.

Q. Now, if you measured that by your courses along that description, would they come so that they would not be taking that point and take running along the street and taking up your courses, did that give you a perfect description of the piece of property included in the Alexander Adams award?

A. Yes.

Mr. ANDREWS.—That is all. [90]

Mr. PROSSER.—I move to strike out all the evidence of this witness on the ground that it is indefinite and uncertain and has no bearing on any of the issues in the case, and on the further ground that the description contained in the deed under which the plaintiff's claim is as follows: (Reads description, and argues.)

The COURT.—If this is not sufficient, gentlemen, added to the map and explanation of this surveyor, a Government employee, I don't know how you are go-

ing to get anything in this territory where you can say that you had, so far as it has been before me. I think you are a little too technical on this point.

(Argument.)

The COURT.—Your argument is that this is not sufficient to identify the property in the complaint?

Mr. PROSSER.—Exactly, your Honor.

The COURT.—I admit the force of your argument. In the States, the Western States, they say,—Section 26 of the northwest quarter of township 2, range 16,—and there is no other piece of land in the United States that will answer to that description. Now, that is more definite, more certain, but, Mr. Prosser, we must have some way of getting at the titles here,—you won't have any title to yourself. We have to get at it the best way we can. I admit the force of your argument that you cannot tell whether it is northeast or southwest corner of that house that the land commenced or whether it was the middle, but with the aid of all the other matters, it seems to me it is sufficient to identify it as the property in the complaint. Now, if that is the property also established by the evidence that they have, I don't see how you can get at it any other way. [91]

Mr. PROSSER.—As my associate says,—the evidence of this witness simply goes to this extent,—that assuming for the sake of argument that this point which I have taken is the correct *copint* to take, then my description is correct, otherwise it is not.

The COURT.—You will have to argue it. I admit the weakness of it there.

Mr. STANLEY.—I submit that the evidence should be stricken out, being merely assumption. There is no positive evidence here where that point was. You first of all have to establish the point and then bring in your surveyor to say this point being established, we can get the other lines, but you might bring in anyone, assuming this to be the point—

The COURT.—Mr. Stanley, it must go to the preponderance of the evidence. I must not require that it shall be absolute,—but what does the preponderance of the evidence show, as to whether this was the property or not, and so far, it seems to me that if I was to sustain your objection I do not know what title would stand.

(Argument.)

The COURT.—I am not absolutely certain that I am right, but I think I am, and I will overrule the motion.

Mr. PROSSER.—Exception.

Mr. ANDREWS.—I understand that by the answer an admission is made of the possession by the defendants. They claim possession of the property and claim in their answer, and it is under oath, that they are in possession, and that is an admission sufficient in law not to have to prove that location.

The COURT.—Yes.

Mr. ANDREWS.—We rest, if the Court please, it being understood that we shall file the patent. [92]

Mr. PROSSER.—Plaintiff having rested in this case, we would like about five minutes to consult with my associates.

(Testimony of Mary Kaleialii.)

The COURT.—Yes.

(Recess 5 minutes.)

Mr. PROSSER.—I will ask Mary Kaleialii to take the stand, please.

Testimony of Mary Kaleialii, for Defendants.

MARY KALEIALII, sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Mrs. Kaleialii, what was the date of your brother Robert's birth?

A. Second of September.

Q. And did he have any name other than Robert?

A. Napunako.

Q. And in what year was he born?

Mr. ANDREWS.—We certainly object; incompetent, irrelevant and immaterial, unless there is some purpose disclosed.

(Argument.)

The COURT.—I will overrule the objection.

Mr. PROSSER.—Q. In what year was he born in, Robert born in?

A. I don't remember; I think he wife knows; I have forgotten.

Q. Was it 1863?

A. I couldn't tell just exactly, I have forgotten.

Q. Do you know what year you were born in?

A. Yes.

Q. What year?

A. 1859—I was fifty-six years old—

Mr. PROSSER.—I now desire to offer official certificate of the Registrar General of the Territorial Board of Health, showing that Robert Boyd, under his native name of Napunako, was born in Honolulu, September 2, 1863, and that the father was Edwin Boyd and the mother was Peke. [93]

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial, not bearing on this case so far as we can see, there being nothing to show that this is the party mentioned.

The COURT.—Let it go in; give you an exception. (Received, marked Defendant's Exhibit 1.)

Mr. PROSSER.—(To Interpreter.) Mr. Hopkins, I will ask you to read it, read it so the Court can understand.

INTERPRETER.—(Reading:) This is to certify that on page 8 of Vol. 4A of the Records of birth in Honolulu, Oahu, between the dates of 1863–1880, occurred the following record of birth: Schoolhouse at Pauca, District of Honolulu, A. D. 1863; Born; the date of the month, September 2; Name, Napunako; male or female, K. (meaning male); name of father, Edwin Boyd, name of mother, Peke. The above is a true and correct copy made by me this 31st day of March, 1915. (Received and marked Defendant's Exhibit 1.)

Mr. PROSSER.—That is all.

Testimony of George C. Kopa, for Defendant.

GEORGE C. KOPA, sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. What is your name?

A. George C. Kopa.

Q. Have you with you Volume 26 of Conveyances?

A. Yes, sir.

Q. Will you turn to page 434?

A. (Witness turns to page.)

Q. What is the conveyance on that page shown?

A. A deed made by Peke A. Stone, daughter of Alexander Adams, Jr., to Maria A. Boyd.

Q. Conveys what property? [94]

A. All her interest in those pieces of land situate on the Island of Oahu which were conveyed to myself and Maria from Alexander Adams, Jr., by deed dated the 15th day of September, 1858, recorded in Book 11, pages 75, 76, 77.

Mr. PROSSER.—I would ask at this time that we be permitted to furnish the Court with a copy of that deed from the record, the same to be marked in evidence as an exhibit on behalf of the defendant.

Mr. ANDREWS.—We have no objection to that part of it; we think it is very wise to get them in that way,—you have certified copies, I take it, of the deeds,—but if the Court please, we object to the deed coming in evidence in order to protect our rights fully on the ground that the deed is incompetent, irrelevant

(Testimony of George C. Kopa.)

and immaterial as far as the issues of this case are concerned, and especially for the reason that it purported to convey to one of the grantees of the deed from Alexander Adams to Peke and Maria, conveying more than she obtained from said deed, to wit, a fee simple title in property in which she only had a life interest.

Mr. PROSSER.—That is the question of law in the whole case, to be decided by your Honor.

(Witness reads deed.)

Mr. PROSSER.—Do you waive the reading of the acknowledgment?

Mr. ANDREWS.—Yes.

The COURT.—The objection will be overruled and an exception noted. You will be permitted to file a certified copy of the deed; mark it exhibit—this will be marked exhibit 2.

Mr. PROSSER.—Q. I will ask you if you have in your possession Volume 96 of Conveyances?

A. Yes. [95]

Q. Will you turn to page 354 thereof and state what conveyance you find there.

A. A deed made by Rebecca Adams Stone to Maria A. Boyd.

Q. What is the date of it? A. October 21, 1885.

Q. What does it convey?

A. Conveying all her interest in those pieces of land which were described in the deed made by Alexander Adams, Jr., to Peke and Maria and recorded in Book 11, on pages 75, 76 and 77.

(Testimony of George C. Kopa.)

Mr. PROSSER.—And you waive the reading of the rest of it?

Mr. ANDREWS.—Yes, on the understanding that a copy of the deed will be presented and filed.

The COURT.—A copy of the deed will be presented as exhibit 3.

Mr. ANDREWS.—We object to it being received in evidence on the grounds before stated.

The COURT.—Objection overruled; exception given.

(Received and marked Defendant's Exhibit 3.)

Mr. PROSSER.—Q. I will ask you if you have Volume 97, and ask you to turn to page 277 thereof.

A. I have.

Q. And what is that conveyance?

A. It is a deed given by Maria A. Boyd, widow, to G. H. Robertson and C. Bolte, trustees.

Q. And what does it convey?

Mr. PROSSER.—I will state to your Honor that it conveys a multitude of properties, and I suggest counsel do the same as they did before, rather than encumber the record.

A. Conveys all and singular the lands, tenements and hereditaments set forth in Schedule A, which are various pieces of land.

Mr. ANDREWS.—I will admit that it includes the land in dispute. [96] We will admit that it includes among others, the land in dispute and consent that a copy of the deed be filed here instead of being read into the record. Then, if the Court please, I object to the deed being offered in evidence on the

same grounds, incompetent, irrelevant and immaterial; and purports to convey from the grantor, greater property than she had in the land in question, to wit, the land in dispute,—that portion of the land in question which is in dispute, a greater estate she conveys or attempts to convey than she had in the land in dispute.

The COURT.—The agreement will be noted, and a copy will be furnished to be marked Defendant's Exhibit 4, and the objection will be overruled and exception given.

Mr. PROSSER.—And you will admit that these various books are produced from the proper custody?

Mr. ANDREWS.—Yes.

Mr. PROSSER.—I now desire to introduce in evidence as an exhibit on behalf of the defendant, original deed from the trustees named in the last conveyance, to wit, Mr. Robertson and Mr. Bolte, to Sullivan and Buckley, dated December 8, 1885, recorded in the office of the Registrar of Conveyances on the 15th day of February, 1886, in Liber 99 at pages 97, etc., dated December 8, 1885, recorded in Liber 99, at page 97, on the 15th day of February, 1886,—the same being a conveyance of the property alleged to have been set forth and described in the complaint.

Mr. ANDREWS.—We object to it on the same grounds as we objected to the other deeds, to wit, incompetent, irrelevant and immaterial as far as the issues of this case are concerned, and purports to convey on the part of the grantees a greater estate

in the land in question than they were entitled to or than they possessed. [97]

(Argument.)

The COURT.—You are claiming from a party that gets the reversion; the objection will be overruled, and it will be admitted.

(Received and marked Defendant's Exhibit 6.)

Mr. ANDREWS.—We except.

Mr. PROSSER.—In order to avoid having to bring in the entire probate record of the Sullivan Estate, I will ask counsel for the defendants to admit that the defendants other than Buckley named herein, have succeeded to such title as Sullivan obtained under the last deed which has just been introduced in evidence, subject to your objection.

Mr. ANDREWS.—We object to the introduction. We admit that the defendants named in our complaint other than John Buckley in his own name, are the heirs at law of John J. Sullivan and are the devisees of John J. Sullivan and trustees under his will and succeed to whatever title he obtained in this property, if any, under the deed of Robertson and Bolte to Buckley and Sullivan, which has been marked exhibit 5. Then we object to the probate record being offered which we understand this admission covers, and object to the testimony that will be given under this admission, on the ground that it is incompetent, irrelevant and immaterial, it having been shown that they had no title to the property, to our interest in the property.

(Testimony of George H. Robertson.)

The COURT.—Same ruling; same exception allowed.

Mr. PROSSER.—That is all.

Mr. ANDREWS.—That is all; no questions.

Mr. PROSSER.—Call Mr. George Robertson. In regard to this witness he is very deaf, and I will have to ask the courtesy of counsel to allow him to go ahead and tell his story practically as he can do it, because it is with the very [98] greatest difficulty that I can talk with him at all.

Mr. ANDREWS.—We will do it to a certain extent. We cannot allow Mr. Robertson to put in anything he sees fit.

Testimony of George H. Robertson, for Defendant.

GEORGE H. ROBERTSON, sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. What is your name?

A. George H. Robertson.

Q. And where do you live?

A. At Honolulu, Punahou District, Bingham and Artesian Street.

Q. Honolulu—are you the George H. Robertson referred to in that certain deed of trust from Maria Boyd to yourself and Mr. Bolte? A. I am.

Q. What relation if any, are you to Mrs. Boyd?

A. Son-in-law.

Q. And what relation are you to that lady who has just testified? A. My wife's sister.

(Testimony of George H. Robertson.)

Q. Now, will you state to the Court under what circumstances that deed of trust was executed?

A. Maria Boyd called on me and Mr. Bolte—

Mr. ANDREWS.—We certainly object to any conversation as to circumstances under which the deed was executed as incompetent, irrelevant and immaterial; we cannot see how that has anything to do with this case.

(Argument.)

The COURT.—I do not know myself what it is, and so you can have the benefit of your objection. I will overrule it now and I may entertain it as soon as I hear the witness through.

Mr. ANDREWS.—We except as it is now. [99]

Mr. PROSSER.—Proceed Mr. Robertson.

A. I said Mary Boyd's property was very much involved. She called upon me and Bolte to act as her trustees. We agreed to do so. We went to the attorney for the mortgagee and asked him how the matter stood. They were to foreclose a mortgage upon the Maunawili Ranch,—the mortgage was eight thousand dollars. We asked the attorney to hold up these proceedings and give us a chance. He gave us twenty-four hours to pay the interest, one thousand dollars or very near it; gave us two months in which to pay \$2500 on account of the mortgage. There was no property in her name that we could realize upon on any such short notice excepting this property that is now in litigation and a piece of property up in Pauoa. We had to raise, immediately, money to pay that interest and hold up the foreclosure. She mort-

(Testimony of George H. Robertson.)

gaged that property before she gave us the trust deed because it took time to make up the trust deed and it could not be done in twenty-four hours notice. We held up that—we held up the foreclosure proceedings. That property at Maunawili was the most valuable asset they had,—it was their house of refuge. They had nothing else to live on. We did the best we could. We paid up \$2,500 on account of that mortgage, and in three months and a half from the day she appointed us as her trustees, she revoked the trust deed, and we deeded her back her property. She turned the property over then to her son James and Antone Rosa, a practicing attorney here at that time. They ran the thing a little while and she took her property back from them and put it in the hands of Robert Boyd, her brother. He ran the property for three or four years and things became [100] very much worse involved. The result was that he surrendered his trusteeship and Charles T. Gulick was appointed in his stead,—Charles T. Gulick was appointed by Maria Boyd and all of the seven children as their trustee. Ned Boyd left in his own name several pieces of property which belonged to the children, Maria Boyd having her life interest in it. All that property is gone, every foot of it. I say, I beg to submit that had we known at that time that there was any reversion in this deed of Alexander Adams, that every one of the children would have signed that deed without a moment's hesitation. They would have done it to have saved Maunawili,—there was their house

(Testimony of George H. Robertson.)

of refuge. Everything they needed was there—they had some rice lands that were rented,—there was everything there to support their family. Had Bolte and I been left alone, we would have pulled that property out. It was sold individually, and each one of the seven children participated in the proceeds from Maunawili Ranch, every one of them.

Mr. ANDREWS.—If the Court pleases, owing to the statement of Mr. Prosser, I didn't make objections from time to time. Now I move to strike it out, absolutely immaterial and hearsay, and being a statement of conclusions. A great deal of it, for instance, as to what happened to different men and what trustees were appointed by Mary Boyd and so on,—that is hearsay and not the best evidence.

Mr. PROSSER.—We will consent to that being stricken.

Mr. ANDREWS.—There are conclusions as to what she should have done with her property.

Mr. PROSSER.—We have consented to it being stricken.

The COURT.—By consent it is hereby stricken out.

Mr. PROSSER.—Q. Where is Maunawili? [101]

A. On the Kailua side of the Island, near Waimanalo, not far from Waimanalo plantation.

Q. Over the Pali? A. Yes.

Q. And what did the property over there consist of?

(Testimony of George H. Robertson.)

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial.

A. Rice lands at that time,—

The COURT.—Overruled for the present.

A. There were cattle, pigs, taro, a fishing right and a fine water right. That water right now is leased to the Waimanalo Plantation. William G. Irwin bought the property eventually. He paid, if I recollect, \$14,000 for it. He acquired a number of lands below where this water used to supply, he bought that land and then turned the bulk of the water over to the Waimanalo Planation, where it is used now for irrigating cane.

Mr. ANDREWS.—I move to strike that answer out as incompetent, irrelevant and immaterial; hearsay; calling for conclusions; nothing to do, having no bearing whatsoever on the question of who owns this piece of property.

(Argument.)

Mr. ANDREWS.—We moved that his entire answer be stricken out, and I thought you consented to it.

Mr. PROSSER.—I didn't consent to that part there. I would like to revise that consent. I wish that portion of the answer given by Mr. Robertson wherein he said the circumstances under which he took this trust and the purposes of the trust, to remain in evidence.

Mr. ANDREWS.—We certainly cannot consent to that.

The COURT.—That was consented to. If not, the

(Testimony of George H. Robertson.)

Court will sustain the objection to it anyway.

Mr. PROSSER.—Exception.

Q. Did either you or Mr. Bolte ever obtain any consideration whatever in or about the execution of that trust deed or [102] care of the property.

A. No, sir.

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial; we don't care whether Mr. Bolte or Mr. Robertson got anything as trustee or not.

The COURT.—I think the objection should be sustained.

Mr. PROSSER.—Exception.

Mr. ANDREWS.—I move that the answer be stricken out.

The COURT.—Yes, I understand that.

Mr. PROSSER.—Q. After the transfer of this property by yourself and Mr. Bolte as shown by the exhibits in this case, what, if any, improvements were put upon the property.

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial; no bearing on the issues in this case whatsoever.

(Argument.)

The COURT.—I don't see how it could, Mr. Prosser.

(Argument.)

The COURT.—Possibly no, gentlemen, but there is a higher court than myself that will probably be able to make a more intelligent case, and I want them to have all the evidence before them. I will overrule your objection and allow it to go in.

(Testimony of George H. Robertson.)

Mr. ANDREWS.—Exception. Not in any way affecting the rights of these plaintiffs to bring suit for this property.

Mr. PROSSER.—What improvements, if any, have been put upon this property since the date of the transfer of the property by yourself and Mr. Bolte to Buckley and Sullivan?

The COURT.—No objection to asking it that way?

Mr. ANDREWS.—No objection.

Mr. PROSSER.—Q. What improvements have been put upon the Sullivan and Buckley property?

A. The Oregon Block has been built up there since. [103]

Q. And have you any idea of the value of that block?

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial, calling for hearsay and a conclusion on the part of Mr. Robertson.

Mr. PROSSER.—All right, withdraw the question.

Q. Describe the Oregon Block.

A. Well, it is a two story brick building, as far as I know; a part of the building is on this lot that is in question now, and a part of it is on what is known as the John Duke lot, which is a separate piece, but is included in the deed of . . .

Q. And is the entire lot built upon?

A. I cannot say as to the rear part; I do not know how far back that building goes.

Q. Was there any building on the property at the

(Testimony of George H. Robertson.)

time that it was conveyed by you to Sullivan and Buckley?

A. It was a small wooden cottage on it.

Q. And that was taken down? A. It was.

Q. And replaced by the present brick structure?

A. It was.

Q. Now, did Robert Boyd and your sister-in-law here know of the conveyance of that property by yourself and Mr. Bolte to Sullivan and Buckley at the time of the conveyance?

A. Robert Boyd wasn't here.

Q. What was that, tell us?

Mr. ANDREWS.—We will object to all this on the grounds that it is incompetent, irrelevant and immaterial; not binding on plaintiffs in this case, and calling for hearsay testimony.

(Argument.)

The COURT.—Personally I do not see the effect of it, but I want you to have all there is in your case. The objection will [104] be overruled.

Mr. ANDREWS.—Exception.

Mr. PROSSER.—Did your sister-in-law, Mrs. Kaleialii, and Robert know of that conveyance made by you and Mr. Bolte?

A. To the best of my knowledge and belief Mary must have known of it, and she was here with the family. Robert Boyd was in Italy at the time.

Q. How long after this conveyance was made was it before Robert Boyd came back?

A. Within a year.

(Testimony of George H. Robertson.)

Q. Did you ever talk with him or her relative to this conveyance? A. No.

Q. Do you know whether Robert knew that this property had been conveyed or not?

A. He knew it after he got back here.

Q. How do you know that he knew it after he got back here?

A. Talk; well about that date that I got—I will say that I didn't see the original deed of Alexander Adams to Maria and Peke until about two years and a half ago. That deed was brought to my wife a short time before she died, by her sister, who is also dead; she brought that deed there, and my wife asked me to look at it. As soon as I opened it I said: "Why, this is the original deed from Alexander Adams to Peke and Maria," and I asked Sarah, the other sister, how she came to get that deed. She asked me if I recollected the time that Robert and James had a big row over the property. I said I did,—that is the time that Maria Boyd took the property away from Jimmie and Antone Rosa and put it into Robert Boyd's hands. Then she told me and my wife that Antone Rosa brought that deed to her and told her to secrete it, because there was going to be trouble over that property. [105]

Mr. ANDREWS.—If the Court please, this is all hearsay.

The COURT.—I think so. Any objection to it being stricken?

Mr. PROSSER.—No objection.

(Testimony of George H. Robertson.)

The COURT.—That will go out.

Q. You knew Robert Boyd during his lifetime?

A. Certainly.

Q. How long have you known him?

A. Since he was a boy; I went to school with James in 1868 or '67, and Robert was a little boy running around then, little chap.

Q. And you say that this Mrs. Kaleialii is your sister-in-law. A. Yes.

Q. That is, you are married to her sister?

A. Yes.

Q. Do you know as a matter of family history who her father is?

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial, Mr. Robertson not being a member of the family.

A. Always understood to be Ned Boyd.

(Argument.)

The COURT.—Let that go out.

Mr. PROSSER.—Q. What relation was this lady to your wife?

A. Sister.

Q. An own sister.

A. To the best of my knowledge and belief, she was never anything else. She was always a sister by Ned Boyd,—always admitted and acknowledged that Ned Boyd was her father.

Q. Both of them? A. Yes.

Q. Both Robert and this lady here who is in court, one of the plaintiffs here, have stated to you that Ed Boyd was their father?

(Testimony of George H. Robertson.)

A. Never said so in so many words.

Q. What was the understanding in the family,—in the Boyd family as to the parentage of Robert and Mary? [106]

Mr. ANDREWS.—That we object to.

A. Always Ed Boyd—

The COURT.—You are asking for their understanding—if you want to prove family history, let them prove what was said and by whom, and not swear to a general understanding.

(Argument.)

The COURT.—My ruling, Mr. Prosser, is on the word “understanding,” I have said he could testify to facts, family history; what was told him,—but for him to testify to the conclusion as to what the understanding was, I do not think he can do that.

Mr. PROSSER.—I will re-form my question,—what were you told by the members of the Boyd family in regard to the parentage of Robert and Mary?

Mr. ANDREWS.—We object on the same ground; that it is incompetent, irrelevant and immaterial; having no bearing on the facts in this case; nothing to do with the ownership of the land in question, it being shown to have descended from her mother.

The COURT.—I cannot say,—I want him to have the benefit of any evidence, and I will overrule your objection and give you an exception.

Mr. PROSSER.—Q. Will you answer the question—what statements, if any, were made to you by the members of the Boyd family as to the parentage

(Testimony of George H. Robertson.)
of Robert and Mary?

A. Many years ago Peke Stone was married to Mr. Stone, but it has always been a foregone conclusion in the family that Ned Boyd was the father of the seven children.

Mr. ANDREWS.—The latter portion we move to strike out.

The COURT.—That will go out.

Mr. PROSSER.—Q. You stated that it was a foregone conclusion.

Mr. ANDREWS.—That has gone out.

Mr. PROSSER.—All right. [107]

Q. What were you told by members of the family in regard to their parentage.

A. I was told that Peke was married to Stone and he left Peke, and Peke was the mother of these children, Mary and Robert; it was understood amongst themselves, it was never questioned.

Q. Who was the father?

A. Ed Boyd was the father.

Mr. ANDREWS.—We move to strike out the understanding, if the Court please.

The COURT.—Yes, that is stricken.

Mr. PROSSER.—Q. By what name were Robert and Mary always known? A. Boyd.

Q. Were they ever referred to as Stone?

A. Never heard it.

Mr. ANDREWS.—We object, your Honor understands on this examination we have no opportunity of objecting before the question is answered. We move that the answers be stricken out; the questions

(Testimony of George H. Robertson.)

are objected to on the ground that they are incompetent, irrelevant and immaterial.

The COURT.—The objection is made in time under the ruling of the Court, but the Court overrules the objection and gives the plaintiff an exception.

Mr. PROSSER.—Q. During this period of time about which you are stating, who was Peke living with?

A. To the best of my knowledge and belief, from hearsay, she and Mary were living with Ed Boyd.

Mr. ANDREWS.—We ask that that be stricken out.

Mr. PROSSER.—No objection.

The COURT.—That will be stricken out.

Mr. PROSSER.—That is all. [108]

Cross-examination of GEO. H. ROBERTSON.

(By Mr. ANDREWS.)

Q. Mr. Robertson, you say you knew the John Duke property?

A. It is known by that name,—on Hotel Street adjoining this Adams lot.

Q. And did you know it when Mr. Duke had it?

A. I do not recollect it, that Duke had it, the man Duke, but I knew it by another name which I have forgotten,—it came in later.

Q. Now, then, when you were there, when you knew the property before it was bought by Mr. Adams, or belonged to his estate, was there a house on the Duke property?

Mr. PROSSER.—Object, improper cross-examination.

(Argument.)

(Testimony of George H. Robertson.)

Mr. ANDREWS.—I withdraw the question, then.

Q. You spoke of a cottage being on this property, —was it on the Adams property or on the Duke property? A. On the Adams property.

Q. Was there anything on the Duke property that you knew of?

Mr. PROSSER.—Object, not proper cross-examination.

Mr. ANDREWS.—I will withdraw the question.

Q. Now, then, this Duke property immediately adjoined the Adams property? A. Yes.

Q. And it fronts on what is now Hotel Street?

A. Yes.

Q. Running from the Adams Lane down toward Union Street?

A. It was on the Union Street side of the Adams property.

Q. The Duke property,—but the Adams property was next to a lane that is now known as Adams Lane?

A. Alexander Adams had a lot of property besides this little [109] lot. There was a large property between this lot and Adams Lane, which is known as Adams Lane at this time.

Q. That was land that belonged to the Adams estate—the property that you and Mr. Bolte sold, that was the same property which had been given to Peke and Maria, that is correct? A. Yes.

Q. And that John Duke's property was in a line along a portion of the Adams property? A. Yes.

Mr. ANDREWS.—That is all.

Mr. PROSSER.—That is all.

Testimony of C. K. Hopkins, for Defendant.

C. K. HOPKINS, sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Mr. Hopkins, did you know Robert Boyd during his lifetime? A. Yes.

Q. And you knew his sister Mary who is here in court? A. Yes.

Q. And how long have you known both of those parties?

A. Long time ago, before '70 anyway.

Q. Were you in the habit of visiting at their home?

A. Well, yes.

Q. Did you ever hear discussed by the members of the family who the parents of Robert and Mary were? A. No.

Mr. ANDREWS.—Object to it as irrelevant.

The COURT.—He said no.

Mr. ANDREWS.—I beg your pardon,—withdraw the objection. [110]

Mr. PROSSER.—Q. Did you ever know Mr. Stone? A. No.

Q. Did you ever hear of him?

A. I have heard of him.

Q. Do you know when he left the country, if he did leave? A. No, I do not.

Mr. PROSSER.—That is all, I guess.

Mr. ANDREWS.—That is all.

Testimony of C. Bolte, for Defendant.

C. BOLTE, sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Mr. Bolte, you are one of the trustees named in that deed of trust from Maria Boyd to yourself?

A. Yes.

Q. And one of the parties named as trustees who conveyed that property by deed to Sullivan and Buckley? A. Yes.

Q. What, if any, improvements were upon that property at the time you took title to it?

A. There was a cottage—

Mr. ANDREWS.—Same objection as to the question asked Mr. Robertson; incompetent, irrelevant and immaterial; not binding in any way upon the plaintiffs to this action.

The COURT.—Same ruling; exception allowed.

A. There was a cottage on the place adjoining, where now the Steiner place is, the four story brick building, I remember there was a stable.

Mr. PROSSER.—Q. What improvements, if any, have been placed upon this property since?

A. A two story brick building. [111]

Mr. ANDREWS.—Same objection.

The COURT.—Same ruling; same exception.

A. Two story brick building and stores in it; rooms to let in the upper floor.

Q. And at the time that this conveyance was made

(Testimony of C. Bolte.)

by yourself and Mr. Robertson, did Maria and Robert know of the conveyance?

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial; calling for hearsay and conclusion on the part of the witness.

The COURT.—I think this is a man who can understand your questions, and I think you should change your interrogatory—what knowledge, if any, they had, that he knows,—and then I will let it be answered, and the other party will be given an exception, and I will pass upon the weight of it.

Mr. PROSSER.—I will withdraw the previous question and accept the suggestion of the Court.

Q. What knowledge, if any, did Robert and Mary have of the conveyance by you to Sullivan and Buckley?

Mr. ANDREWS.—Same objection.

The COURT.—Same ruling; same exception.

A. I don't know what knowledge they had at the time that we made the deed. This was in along 1886; I don't know what knowledge they had at that time. Robert was not here; he was in Italy, but he came back very soon after. I had not spoken with them at that time. Years after, it was a family matter, from their brothers and sisters, and from their mothers.

Mr. ANDREWS.—Certainly object to that.

Mr. PROSSER.—Q. How do you know they knew from their mothers and sisters?

The COURT.—If that is answered, it will go out. I think, Mr. [112] Prosser, that it suffices that

(Testimony of C. Bolte.)

they knew it from—that it was a family matter, that they knew it from the mothers,—must have known it, that is, about it. (Argument.) I will allow it to be answered, but if it is shown to be hearsay, it will go out.

A. I talked with the mothers and talked with, for instance, Mr. Robertson's wife; I also talked with James.

Mr. ANDREWS.—Now, we move to strike it out.

The COURT.—It shows that it is hearsay; it will go out.

Mr. PROSSER.—That is all.

Mr. ANDREWS.—That is all.

Testimony of John Buckley, for Defendant.

JOHN BUCKLEY, sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OLSON.)

Q. Your name, please? A. John Buckley.

Q. Mr. Buckley, are you the John Buckley who was one of the grantees in the deed from C. Bolte and Mr. Robertson as trustees of the property which is involved in this suit? A. Yes.

Q. When did Mr. Sullivan die,—approximately, not necessarily the day?

A. In 1911, about the middle of October, 15th, I think, if I be right.

Q. And did you and Mr. Sullivan continue as together interested in that property up to that time?

A. Yes, sir.

(Testimony of John Buckley.)

Q. I will ask you whether or not at any time, any other person than yourselves and your agents were in possession of that [113] property at any time from the time that you got this deed from the trustees up to the time that Mr. Sullivan died?

Mr. ANDREWS.—Object, incompetent, irrelevant and immaterial; the admission having been made that they are in possession as far as that goes, and for any other purpose, it is not binding on the plaintiff, nor has it any relevancy so far as the land is concerned.

(Argument.)

The COURT.—The objection will be overruled, and exception given.

Mr. OLSON.—Q. Has anybody else except you and Mr. Sullivan and your agents been in possession of that property?

A. No, sir; there has never been anybody in possession; we paid all taxes due on the property; collected the rents from the tenants until the present day.

Q. This deed was in 1885? A. 1885, yes sir.

Q. Now, then, when you first obtained this deed from Bolte and Robertson, how did you make use of the property? A. We ran it as a livery stable.

Q. And how long did that continue?

Mr. ANDREWS.—Same objection to all this line of testimony and exception.

Mr. OLSON.—That is consented to.

Q. About how long?

A. I never put down the date; I think about ten

(Testimony of John Buckley.)

or eleven years, along in that neighborhood; I couldn't tell.

Q. Then what did you do with the property?

A. We leased it out and there was a building put up.

Q. Who built the building A. Well—

Q. Did your tenants A. Yes.

Q. And to whom did they pay their rent? [114]

A. They paid the lease; we collected from them every month.

Q. Paid it to you? Yes.

Q. You and Mr. Sullivan?

A. Me and Mr. Sullivan.

Q. And since Mr. Sullivan's death, to the trustees of the estate and yourself?

A. Yes, we have collected the rents since Mr. Sullivan died.

Q. Now, what kind of a building was put up upon these premises by these tenants that you speak of?

A. Two story brick.

Mr. ANDREWS.—Same objection; same exception.

Mr. OLSON.—Q. And when was that building erected, what year?

A. I think it was,—I could not tell very exact, I never set it down, but I think, if I remember right, 1901 or 1902, along in that neighborhood.

Q. The building was erected? A. Yes.

Q. This building is still there? A. Yes.

Q. Since that time, I will ask you whether or not you and your agents have made use of the entire

(Testimony of John Buckley.)

portion of the property?

A. We made use of all the property and paid all the taxes on all the property.

Q. And have been in sole and exclusive possession.

A. Up to the present day.

Q. You have? A. Yes, sir.

Mr. OLSON.—No further questions.

Cross-examination of JOHN BUCKLEY.

(By Mr. ANDREWS.)

Q. Mr. Buckley, this building that you speak of that your tenants built, that doesn't only include the Adams property that you bought, does it? [115]

A. It includes the property which we bought from Mr. Bolte and Mr. Robertson. We put up the building on it.

Q. Then do you know how much of that property that building is on, the property known as the Adams property, which you bought?

A. No, sir, we always believed it belongs to us now, and for thirty years and over, and we paid all taxes and all assessments against the property—

Q. I am not asking that, Mr. Buckley, what I want to know is do you know what portion of that lot that you bought from Bolte and Robertson was Adams estate and what portion was some other property? A. Ask that again.

Q. I wanted to know if you know how much of this portion that you bought from Bolte and Robertson was Adams property and how much belonged to this man Duke or other people you bought from?

(Testimony of John Buckley.)

A. I don't know; when we bought it, we bought the whole property.

Mr. PROSSER.—That is all.

Mr. ANDREWS.—That is all.

Mr. PROSSER.—That closes our case, if the Court please.

Mr. ANDREWS.—We rest, too. Will your Honor set a time for argument?

The COURT.—I want to say that this would be the merest guesswork on my part if I had to determine it now. I do not know what my decision would be. I wish you would make out an abstract on each side, or deraignment of title, as you claim it, on each side, and place it before me; and do you wish to argue the case orally?

Mr. OLSON.—I should say that we will be able, in our oral argument, to present to you what we think clearly shows [116] that this deed, a copy of which is attached to the complaint and which is claimed merely to give a life estate to the grantees—

The COURT.—I am not satisfied with your oral argument; I want this deraignment of title first, and then we will set the time for the oral argument.

Mr. OLSON.—We think there should be oral argument, because we think that we can make it clear just what the points in the case are.

The COURT.—The case is submitted; make out that deraignment of title and put in your remarks as you go along.

(Argument.)

(Testimony of John Buckley.)

The COURT.—You will each have five days within which to file your deraignment of title. The case is submitted. [117]

I hereby certify that the foregoing is a full, true and correct transcript of my shorthand notes taken in the trial of the above-entitled cause.

ELLEN K. DWIGHT,

Official Shorthand Reporter, First Circuit Court.

Honolulu, Hawaii, March 2, 1916.

[Endorsed]: No. 913. Rec'd and Filed in the Supreme Court, March 2, 1916, at 8:50 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [118]

In the Supreme Court of the Territory of Hawaii.

January Term, 1916.

(STAMPED \$2.00)

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Paintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HEN-
RIETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD

CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

**Petition for Writ of Error Returnable to Supreme
Court, Territory of Hawaii.**

ACTION TO QUIET TITLE.

To the Honorable the Chief Justice and Associate
Justices of the Supreme Court of the Territory
of Hawaii:

The petition of Mary Kaleialii, Rebecca Lehia Miles, and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by their guardian *ad litem*, Josephine Boyd, the plaintiffs in error above named, respectfully shows unto this Honorable Court as follows, to wit:

That heretofore and on or about the 27th day of July, 1914, the plaintiffs in error brought their action against Henrietta Sullivan, John Buckley and Henry Holmes, Trustees under the Will of John J. Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke and Robert Kirkwood Clarke, a minor, Juanita Ellen Clarke, a minor, and Thomas Walters Clarke, a minor, defendants in error in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, to quiet the title to certain land situated in the City and County of Honolulu, Territory of Hawaii; [119]

That thereafter, and on, to wit, the 31st day of March, 1915, and on the 12th day of January, 1916, said cause came on regularly and duly for trial in said Circuit Court before the Honorable T. B.

Stuart, Third Judge of the Circuit Court of the First Judicial Circuit, sitting without a jury;

That after hearing the evidence adduced by the parties hereto, said court granted judgment for the defendants in error, together with the costs of the action;

That six months have not elapsed since said judgment was rendered, entered and recorded and that said judgment is unpaid and has not been satisfied, either in whole or in part;

That plaintiffs in error feel aggrieved by the said judgment and say that the proceedings prior to judgment and during the trial and at the trial and by the judgment of the court errors of law were committed by the said Circuit Court to the prejudice of the plaintiffs in error, an assignment whereof is herewith presented and filed, and they ask and pray that the proceedings in said cause, as shown by the record, pleadings, minutes of the clerk, exhibits and the evidence recorded by the official stenographer of the said court, be inquired into and reviewed by this Honorable Court in connection with this petition.

WHEREFORE, your petitioners pray that a writ of error may issue out of this court addressed to the clerk of the said Circuit Court of the First Judicial Circuit, Territory of Hawaii, commanding him, the said clerk, to send up to this Honorable Court all and singular the record in said described and mentioned action at law to the end that the errors existing in the record may be corrected, and petitioners further pray that said errors may be by this Honorable Court corrected, the said verdict set aside, the judgment

reversed and judgment given to the plaintiffs herein and full and complete justice may be done in the premises.

MARY KALEIALII,
REBECCA LEHIA MILES, and
ANNIE K. BOYD,
ROBERT N. BOYD and
VICTOR K. BOYD,

By Their Guardian *ad Litem*,
JOSEPHINE BOYD,
By LORRIN ANDREWS,
Their Attorney.

Dated, Honolulu, T. H., January 22, 1916. [120]

Territory of Hawaii,
City and County of Honolulu,—ss.

MARY KALEIALII, one of the plaintiffs in error above named, for herself and on behalf of the other plaintiffs in error herein, being first duly sworn, deposes and says: That she is one of the plaintiffs in error named above; that she has read the foregoing petition and knows the contents thereof and that the same is true to the best of her knowledge and belief.

MARY KALEIALII.

Subscribed and sworn to before me this 22d day of January, 1916.

[Seal]

JAS. K. JARRETT,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [121]

In the Supreme Court of the Territory of Hawaii.

January Term, 1916.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HEN-
RIETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,
Defendants in Error.

**Assignments of Error on Writ of Error Returnable
to Supreme Court, Territory of Hawaii.**

ACTION TO QUIET TITLE.

Now come the plaintiffs in error, Mary Kaleialii, Rebecca Lehia Miles and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by their guardian *ad litem*, Josephine Boyd, by their counsel, Lorrin Andrews, and assign errors committed by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, at the trial of the above-entitled cause in March, 1915, to the prejudice of the plaintiffs in error, during the progress of the case and in the de-

termination of the same, to which plaintiffs duly excepted, as follows, to wit:

I.

The said Court erred in construing the deed of Alexander Adams, Jr., dated September 15, 1858, offered in evidence as exhibit "A" in said case, as devising to Peke and Maria, his daughters, an estate in fee, giving to each an undivided one-half ($\frac{1}{2}$) of the land set forth in said deed. Said construction so given by said Circuit Court was and is contrary to law, contrary to the evidence in the case and contrary to the intent of said grantor as gathered from and shown by the deed [122] in its entirety and which construction thereof, by said Circuit Court, was and is prejudicial to the rights of the plaintiffs in error, and erroneous.

II.

The said Circuit Court erred in deciding in favor of the defendants in error and in rendering and entering judgment in favor of the defendants in error and against the plaintiffs in error, to which the plaintiffs in error duly excepted.

And for and on account of said errors assigned above, the plaintiffs in error pray that all the proceedings in said action be, by this Honorable Court, reversed; and that said judgment and decision of the Circuit Court be set aside, and such orders and judgment be entered herein as to this Honorable Court

may seem meet and proper.

MARY KALEIALII,
REBECCA LEHIA MILES, and
ANNIE K. BOYD,
ROBERT N. BOYD and
VICTOR K. BOYD,

By Their Guardian *ad Litem*,

JOSEPHINE BOYD,

Plaintiffs in Error,

By LORRIN ANDREWS,

Their Attorney. [123]

In the Supreme Court of the Territory of Hawaii.

January Term, 1916.

(STAMPED \$2.00)

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Paintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HEN-
RIETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

Writ of Error, Returnable to Supreme Court, Territory of Hawaii.

The Territory of Hawaii, to Henry Smith, Esquire,
Clerk of the Circuit Court, First Judicial Circuit:

Whereas, in an action lately pending before the Circuit Court of the First Circuit, in which the said Mary Kaleialii, Rebecca Lehia Miles and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by their guardian *ad litem*, Josephine Boyd, were plaintiffs, and the said Henrietta Sullivan, John Buckley and Henry Holmes, Trustees under the Will of John Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke and Robert Kirkwood Clarke, a minor, Juanita Ellen Clarke, a minor, and Thomas Walters Clarke, a minor were defendants, error is alleged to have occurred as appears by the assignment of errors on file in this court you are commanded forthwith to send up to this court the record and the exhibits filed in said [124] proceedings.

Witness, the Hon. A. G. M. ROBERTSON, Chief Justice of the Supreme Court, at Honolulu, Territory

J. A. T.,
Clerk.

February

of Hawaii, this 2d day of ~~January~~, 1916.

By the Court:

[Seal]

J. A. THOMPSON,
Clerk Supreme Court.

Received the foregoing writ of error on this 2d day of February, 1916, at 3:50 P. M.

HENRY SMITH,
Clerk Circuit Court, First Circuit.

In obedience to the within writ to me directed, I herewith send up the record and all the exhibits filed in said above-mentioned cause.

Dated, March 2, 1916.

HENRY SMITH,
Clerk Circuit Court, First Circuit.

[Endorsed]: No. 913. In the Supreme Court of the Territory of Hawaii. Mary Kaleialii, Rebecca Lehia Miles et al., Plaintiffs in Error, vs. Henrietta Sullivan et al., Defendants in Error. Writ of Error. Filed and Issued February 2, 1916, at 3:49 P. M. J. A. Thompson, Clerk. Received and filed in the Supreme Court March 2, 1916, at 8:50 o'clock A. M. Robert Parker, Jr., Assistant Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Plaintiffs in Error. [125]

In the Supreme Court of the Territory of Hawaii.

October Term, 1915.

No. 913.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HEN-
RIETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN

CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor.

Opinion of Supreme Court, Territory of Hawaii.

Hon. T. B. STUART, Judge.

Submitted March 9, 1916.

Decided April 20, 1916.

WATSON AND QUARLES, JJ., and Circuit Judge
ASHFORD in Place of ROBERTSON, C. J.,
Disqualified.

Appeal and Error—Writ of Error.—Judgment af-
firmed where the same is in conformity with the
opinion of this court heretofore rendered in the
same case upon reserved questions involving the
same issues. [126]

PER CURIAM.—This is a writ of error to review
the judgment of the Circuit Court in defendants'
favor in an action at law to quiet title to certain
real estate situate in the city and county of Honolulu.
The case was tried in the court below, jury waived.
The decision and judgment of the lower court are
in conformity with the views expressed by this court
in its opinion (ante, p. 38) when the case was before
us on reserved questions involving identically the
same issues. Finding no error on the record the
judgment is affirmed with costs to the defendants in
error.

LORRIN ANDREWS, for Plaintiffs in Error.

FREAR, PROSSER, ANDERSON & MARX and
HOLMES & OLSON, for Defendants in Error.

By the Court:

J. A. THOMPSON,
Clerk.

[Endorsed]: No. 913. Supreme Court, Territory of Hawaii. October Term, 1915. Mary Kaleialii, Rebecca Lehia Miles, and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by Their Guardian *ad Litem*, Josephine Boyd, vs. Henrietta Sullivan, John Buckley and Henry Holmes, Trustees Under the Will of John J. Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke, and Robert Kirkwood Clarke, a Minor, Juanita Ellen Clarke, a Minor, and Thomas Walters Clarke, a Minor. Decision. Filed April 20, 1916, at 3:52 P. M. J. A. Thompson, Clerk. [127]

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Paintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HEN-
RIETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN

CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

Judgment, Supreme Court, Territory of Hawaii.

ACTION TO QUIET TITLE.

This cause coming on to be heard at the October, 1915, Term of the Supreme Court on writ of error to the Circuit Court of the First Judicial Circuit, jury waived, Lorrin Andrews appearing for plaintiffs in error, and Messrs. Frear, Prosser, Anderson & Marx and Messrs. Holmes & Olson appearing for defendants in error, was duly submitted, and the Supreme Court having on April 20, 1916, filed a written opinion holding that the assignments of error should not be sustained and that the judgment of the Circuit Court should be affirmed.

It is hereby ordered and adjudged that the judgment of the Circuit Court herein be and is hereby affirmed with costs.

By the Supreme Court:

[Seal]

J. A. THOMPSON,

Clerk.

J. A. T.
Clerk.
J. K. J.

Entered this 9th day of May, 1916.

as of April 20th, 1916.

Approved:

E. M. WATSON,

Associate Justice, Supreme Court.

[Endorsed]: No. 913. In the Supreme Court of the Territory of Hawaii. Mary Kaleialii et al.,

Plaintiffs in Error, vs. Henrietta Sullivan, Defendants in Error. Judgment. Filed May 9, 1916, at 4:28 P. M. J. A. Thompson, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Plaintiffs in Error. [128]

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Paintiffs in Error,
vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HEN-
RIETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,
Defendants in Error.

**Petition for Writ of Error and Supersedeas Return-
able to U. S. Circuit Court of Appeals.**

ACTION TO QUIET TITLE.

The above-named plaintiffs in error, Mary Kalei-
alii, Rebecca Leahia Miles and Annie K. Boyd, and
Robert N. Boyd, and Victor K. Boyd, by their
guardian *ad litem*, Josephine Boyd, deeming them-
selves aggrieved by the judgment of the Honorable,

the Supreme Court of the Territory of Hawaii entered in a cause entitled "Mary Kaleialii et al., Plaintiffs in Error, vs. Henrietta Sullivan, John Buckley and Henry Holmes, Trustees Under the Will of John J. Sullivan et al., Defendants in Error," on or about the 9th day of May, 1916, come now by Lorrin Andrews, their attorney, and hereby humbly petition said Supreme Court of the Territory of Hawaii for an order allowing said plaintiffs in error to prosecute a writ of error and have the same allowed and issued from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii under and according to the laws of the United States in that behalf made and provided, and that a transcript of [129] the record, proceedings and documentary exhibits upon which said judgment was made duly authenticated, may be sent to said United States Circuit Court of

J. A. T.
Clerk.
May 29,
1916.

Appeals for the Ninth Circuit; and also that an order may be made by this Honorable Court fixing the amount of the bond which the said plaintiffs shall give and furnish upon said writ of error, and that upon the filing of such bond, all proceedings in said cause in the Supreme Court of the Territory of Hawaii and in the Circuit Court of the First Judicial Circuit be suspended and stayed until the determination of such writ of error by the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit.

That six months have not elapsed since said judgment was rendered, entered and recorded and that said judgment is unpaid and has not been satisfied,

either in whole or in part.

And in this behalf, your petitioners show, by the affidavit of Mary Kaleialii, that the said judgment was rendered in an action to quiet title at law and that the amount involved, exclusive of costs, exceeds the value of \$5,000, and amounts to to wit, the sum of \$15,000.

WHEREFORE, petitioners pray that a writ of error may issue out of this Court to the end that the errors existing in the record may be corrected and the judgment reversed and judgment given to the plaintiffs herein and full and complete justice may be done in the premises.

Dated, Honolulu, T. H., May 9, 1916.

LORRIN ANDREWS,
Attorney for Petitioners. [130]

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD

CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

**Assignments of Error on Return to Writ of Error
Returnable to U. S. Circuit Court of Appeals.**

ACTION TO QUIET TITLE.

Now comes the plaintiffs in error, Mary Kaleialii, Rebecca Lehia Miles and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by their guardian *ad litem*, Josephine Boyd, by their counsel, Lorrin Andrews, and make the following assignments of error, which they aver and submit were committed by the Supreme Court of the Territory of Hawaii in and by its opinion, decision and judgment in this cause, that is to say:

I.

The court erred in sustaining the Circuit Order of the First Judicial Circuit in construing the deed of Alexander Adams, Jr., dated September 15, 1858, offered in evidence as exhibit "A" in said case, as devising to Peke and Maria, his daughters, an estate in fee, giving to each an undivided one-half ($\frac{1}{2}$) of the land set forth in said deed. Said construction so given by said Circuit Court was and is contrary to law, contrary to the evidence in the case and contrary to the intent of said grantor, as [131] gathered from and shown by the deed in its entirety, and which construction thereof, by said Circuit Court, was and is prejudicial to the rights of the plaintiffs in error, and erroneous.

II.

The court erred in sustaining the Circuit Court of the First Judicial Circuit in deciding in favor of the defendants in error and in rendering and entering judgment in favor of the defendants in error and against the plaintiffs in error, to which the plaintiffs in error duly excepted.

And for and on account of said errors assigned above, the plaintiffs in error pray that the judgment of said Supreme Court of the Territory of Hawaii so ordered, rendered and entered in this case may be reversed.

Dated, Honolulu, T. H., May. 9, 1916.

MARY KALEIALII,

REBECCA LEHIA MILES and

ANNIE K. BOYD and

ROBERT N. BOYD, and

VICTOR K. BOYD,

By Their Guardian *ad Litem*,

JOSEPHINE BOYD,

Plaintiffs in Error.

By LORRIN ANDREWS,

Their Attorney. [132]

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

Affidavit as to Amount Involved.

ACTION TO QUIET TITLE.

Territory of Hawaii,

City and County of Honolulu,—ss.

Mary Kaleialii, of the City and County of Honolulu, Territory of Hawaii, being first duly sworn, deposes and says: That she is one of the plaintiffs in error in the above-entitled cause, and is well acquainted with the matters in controversy in said cause and with the interests of plaintiffs in error herein; that the value of the estate sought to be disposed of in said action to quiet title and the share

claimed by plaintiffs in error therein which is in dispute in this case is upwards of Fifteen Thousand Dollars (\$15,000.00); that the value of the interests in said cause involved and dependent upon the outcome of said controversy between the plaintiffs in error and defendants in error, exclusive of costs, far exceeds the sum or value of Five Thousand Dollars (\$5,000.00) that under the decision of the Supreme Court of the Territory of Hawaii, the plaintiffs in error are totally deprived of their interests in said estate and that the value of said estate to deponent, if the decision of the Supreme Court of the Territory of Hawaii is reversed and set aside, will amount to Seven Thousand Five Hundred Dollars (\$7,500).

MARY KALEIALII.

Subscribed and sworn to before me, this 25th day of April, A. D. 1916.

[Seal]

JAS. K. JARRETT,

Notary Public, First Judicial Circuit, Territory of Hawaii. [133]

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the

Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

**Order Allowing Writ of Error and Supersedeas
Returnable to U. S. Circuit Court of Appeals.**

ACTION TO QUIET TITLE.

Upon reading and filing the foregoing petition for a writ of error together with an assignment of errors presented therewith, alleged to have occurred in the judgment of this Court and in the proceedings in the trial of said cause prior thereto,

IT IS ORDERED that a writ of error be and the same is hereby allowed to the said Mary Kaleialii, Rebecca Lehia Miles, and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by their guardian *ad litem*, Josephine Boyd, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered in the above-entitled cause and the proceedings in the trial of said cause prior thereto, and that the amount of bond on said writ of error be, and the same is hereby fixed in the sum of FIVE HUNDRED DOLLARS (\$500.00); and that upon the filing by said above-named plaintiffs in error of an approved bond in said amount, all further proceedings in said cause and in the said Supreme Court of the Territory of Hawaii shall be stayed and suspended until the determina-

tion of such said writ of [134] error by the said United States Circuit Court of Appeals for the Ninth Circuit.

[Seal]

E. M. WATSON.

Asso. Justice Supreme Court for the Territory of Hawaii.

Dated, this 9th day of May, 1916.

[Endorsed]: No. 913. In the Supreme Court of the Territory of Hawaii. Mary Kaleialii, et al., Plaintiffs in Error, vs. Henrietta Sullivan, et al., Defendants in Error. Petition for Writ of Error and Supersedeas, Assignments of Error, Affidavit, Order Allowing Writ of Error and Supersedeas. Filed May 9, 1916, at 2:50 P. M. J. A. Thompson, Clerk. Lorrin Andrews, Honolulu, T. H. Attorney for Plaintiffs in Error. [135]

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD

CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

**Supersedeas and Cost-bond on Writ of Error
Returnable to U. S. Circuit Court of Appeals.**

ACTION TO QUIET TITLE.

KNOW ALL MEN BY THESE PRESENTS:

That we, Mary Kaleialii, Rebecca Lehia Miles, and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by their guardian *ad litem*, Josephine Boyd, as principals, and Edward P. Fogarty and Joaquim G. da Silva, as sureties, all of the City and County of Honolulu, in the Territory of Hawaii, are held and firmly bound unto Henrietta Sullivan, John Buckley and Henry Holmes, Trustees under the Will of John J. Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke and Robert Kirkwood Clarke, a minor and Juanita Ellen Clarke, a minor, and Thomas Walters Clarke a minor, in the sum of Five Hundred Dollars (\$500.00), to the payment whereof, well and truly to be made, we do hereby firmly bind ourselves and our respective heirs, executors and administrators.

The condition of this obligation is as follows:

Whereas, in an action at law heretofore pending in and before the Supreme Court of the Territory of Hawaii, wherein said bounden principals were plaintiffs in error, and said obligees were defendants in error, the said Supreme Court did, on the 20th [136] day of April, 1916, order, render and enter a

judgment of said Supreme Court, wherein and
whereby there was and is affirmed a certain

17th

J. G. da
Silva
E. P. Fo-
garty
J. A. T.
Clerk.

judgment theretofore, to wit, on the 9th

January, 1916,

day of ~~November, 1915~~, rendered and en-

tered in and by the Circuit Court for the

First Circuit of said Territory, in a cause wherein
said bounden principals were parties plaintiff, and
said obligees were parties defendant, and which said
judgment was in favor of said defendants; and
whereas said bounden principals have applied for,
and are about to sue out, a writ of error from the
United States Circuit Court of Appeals for the
Ninth Circuit to said Supreme Court of the Terri-
tory of Hawaii to the end that the judgment of the
said Supreme Court, above described, may be re-
viewed by said United States Circuit Court of Ap-
peals for the Ninth Circuit, and have taken, or are
about to take such further and other proceedings as
may be necessary to obtain a review by said United
States Circuit Court of Appeals for the Ninth Cir-
cuit of the judgment last aforesaid;

NOW THEREFORE, if the said bounden prin-
ciples shall prosecute said writ of error to effect, and
shall answer all damages and cost if they fail to make
their plea good, then the above obligation shall be
void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said principals
and the said sureties have hereunto set their hands
and seals at the City and County of Honolulu, Terri-

tory of Hawaii, this 6th day of May, A. D. 1916.

MARY KALEIALII,
REBECCA LEHIA MILES,
ANNIE K. BOYD,
ROBERT N. BOYD and
VICTOR K. BOYD,

By JOSEPHINE BOYD,
Their Guardian *ad Litem*.

E. P. FOGARTY,
JOAQUIM G. da SILVA.

Approved:

[Seal]

E. M. WATSON,
May 8, 1916,

Associate Justice, Supreme Court, Territory of
Hawaii.

Approved:

FREAR, PROSSER, ANDERSON & MARX,

Attys. for Defendants. [137]

[Endorsed]: No. 913. In the Supreme Court of the Territory of Hawaii. Mary Kaleialii, et al., Plaintiffs in Error, vs. Henrietta Sullivan, et al., Defendants in Error. Supersedeas and Cost-Bond on Writ of Error. Filed May 9, 1916, at 2:50 P. M. J. A. Thompson, Clerk. Lorrin Andrews, 37 Merchant St., Attorney for Plaintiffs in Error. [138]

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

**Writ of Error to the Supreme Court for the
Territory of Hawaii.**

ACTION TO QUIET TITLE.

The United States of America,—ss.

The President of the United States to the Honorable,
the Justices of the Supreme Court of the Terri-
tory of Hawaii, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said Supreme Court for the Territory of Hawaii,
before you, or some of you, between Mary Kaleialii,
Rebecca Lehia Miles, Annie K. Boyd, and Robert N.
Boyd, and Victor K. Boyd, by their guardian *ad*

litem, Josephine Boyd, Plaintiffs in Error, and Henrietta Sullivan, John Buckley and Henry Holmes, Trustees under the Will of John J. Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke and Robert Kirkwood Clarke, a minor, Juanita Ellen Clarke, a minor, and Thomas Walters Clarke, a minor, Defendants in Error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by their complaint appears:

We being willing that error, if any hath been, shall be [139] duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within Thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 9th day of May, in the year of our Lord one thou-

sand nine hundred and sixteen.

[Seal]

J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of
Hawaii.

Allowed this 9th day of May, 1916.

E. M. WATSON,
Associate Justice of the Supreme Court of the Terri-
tory of Hawaii. [140]

[Endorsed]: No. 913. In the Supreme Court of
the Territory of Hawaii. Mary Kaleialii et al.,
Plaintiffs in Error, vs. Henrietta Sullivan et al., De-
fendants in Error. Writ of Error to the Supreme
Court for the Territory of Hawaii. Filed May 9,
1916, at 2:50 P. M. J. A. Thompson, Clerk. [141]

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,

Defendants in Error.

**Citation on Writ of Error Returnable to U. S. Circuit
Court of Appeals.**

ACTION TO QUIET TITLE.

THE UNITED STATES OF AMERICA,—ss.

The President of the United States to Henrietta Sullivan, John Buckley and Henry Holmes, Trustees Under the Will of John J. Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke and Robert Kirkwood Clarke, a Minor, Juanita Ellen Clarke, a Minor, and Thomas Walters Clarke, a Minor, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty days after the date of this citation, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Mary Kaleialii, Rebecca Lehia Miles and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by their guardian *ad litem*, Josephine Boyd, are plaintiffs in error, and you are defendants in error,—to show cause, if any there be, [142] why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 9th day of May, in the year

of our Lord one thousand nine hundred and sixteen.

E. M. WATSON,

Associate Justice of the Supreme Court of the Territory of Hawaii.

[Seal]

Attest: J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Due service of the within citation and receipt of copy is hereby admitted this 11th day of May, A. D. 1916.

FREAR, PROSSER, ANDERSON & MARX,

Attorneys for Defendants in Error. [143]

[Endorsed]: No. 913. In the Supreme Court of the Territory of Hawaii. Mary Kaleialii et al., Plaintiffs in Error, vs. Henrietta Sullivan et al., Defendants in Error. Citation. Filed and Issued for Service May 9, 1916, at 2:50 P. M. J. A. Thompson, Clerk. [144]

Returned May 11, 1916, at 11:00 A. M. J. A. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES,
ANNIE K. BOYD, and ROBERT N. BOYD,
and VICTOR K. BOYD, by Their Guardian
ad Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRIETTA

SULLIVAN, JOHN BUCKLEY, PRISCILLA ALBERTA SULLIVAN CLARKE and ROBERT KIRKWOOD CLARKE, a Minor, JUANITA ELLEN CLARKE, a Minor, and THOMAS WALTERS CLARKE, a Minor,

Defendants in Error.

Praeceptum for Transcript of Record.

ACTION TO QUIET TITLE.

To James A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error heretofore issued by said Court and include in said transcript the following pleadings, proceedings, opinions, judgments and papers on file in said cause, to wit:—

1. Amended bill of complaint and attached thereto as exhibits thereof, the following: Exhibit "A," copy of deed of Alexander Adams, Jr., to Peke and Maria, dated Sept. 15, 1858, recorded in Book 11, p. 75, and Exhibit "B," a translation of said deed of Sept. 15, 1838, marked Exhibit "A."
2. Defendants' answer and plea.
3. Copy clerk's minutes of the Circuit Court.
4. Reservation of questions of law for consideration of the Supreme Court, including Exhibits "A," "B," "C," and "D."

5. Opinion of Supreme Court on reserved question of law entered *entered* November 8, 1915. (Case No. 879.)
6. Notice of decision on reserved question of law of the Supreme Court.
7. Decision of the Circuit Court dated January 12, 1916.
8. Judgment of the Circuit Court entered January 17, 1916. [145]
9. Transcript of evidence, Circuit Court.
10. Petition for writ of error to the Circuit Court of the First Judicial Circuit, Territory of Hawaii.
11. Plaintiffs' assignments of error.
12. Writ of error.
13. Decision of the Supreme Court rendered April 20, 1916.
14. Judgment of the Supreme Court entered May 9, 1916, as of April 20, 1916.
15. Petition for writ of error and supersedeas.
16. Assignments of error.
17. Affidavit as to amount involved.
18. Order allowing writ of error and supersedeas.
19. Supersedeas and cost bond on writ of error.
20. Writ of Error to the Supreme Court for the Territory of Hawaii.
21. Citation and acknowledgment of service thereof.

You will also annexed to and transmit with the record the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit and Citation with return of service, your re-

turn to the writ of error under seal of the Supreme Court of the Territory of Hawaii, and also your certificate under seal, stating in detail the cost of the record and by whom the same was paid.

Dated, Honolulu, T. H., May 9, 1916.

Respectfully,

LORRIN ANDREWS,

Attorney for Plaintiffs in Error.

[Endorsed]: No. 913. In the Supreme Court of the Territory of Hawaii. Mary Kaleialii, et al., Plaintiffs in Error, vs. Henrietta Sullivan, et al., Defendants in Error. Praeceptum to Clerk. Filed May 11, 1916, at 11:00 o'clock A. M. J. A. Thompson, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Plaintiffs in Error. [146]

In the Superior Court of the Territory of Hawaii.

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees Under the
Will of JOHN J. SULLIVAN, HENRIETTA
SULLIVAN, JOHN BUCKLEY, PRIS-
CILLA ALBERTA SULLIVAN CLARKE
and ROBERT KIRKWOOD CLARKE, a

Minor, JUANITA ELLEN CLARKE, a
Minor, and THOMAS WALTERS CLARKE,
a Minor.

Defendants in Error.

**Order Extending Time for Preparation and
Transmission of Record.**

ACTION TO QUIET TITLE.

Upon the application of counsel for plaintiffs in error, and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit, it is hereby ordered that the plaintiffs in error and the Clerk of this Court be and they are hereby allowed until and including the 30th day of June, 1916, within which time to prepare and transmit to the Clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this court, together with said assignment of errors and all other papers required as part of said record.

Dated at Honolulu, Territory of Hawaii, this 29th day of May, A. D. 1916.

[Seal]

E. M. WATSON,
Associate Justice, Supreme Court, Territory of
Hawaii.

Approved: HOLMES & OLSON,

FREAR, PROSSER, ANDERSON & MARX.

Attorneys for Defendants in Error. [147]

[Endorsed]: No. 913. In the Supreme Court of the Territory of Hawaii. Mary Kaleialii, et al., Plaintiffs in Error, vs. Henrietta Sullivan, et al., Defendants in Error. Order Extending Time for Preparation and Transmission of Record. Filed May 29, 1916, at 10:10 A. M. J. A. Thompson, Clerk.
[148]

*In the Supreme Court of the Territory of Hawaii,
October Term, 1915.*

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD, and ROBERT N.
BOYD, and VICTOR K. BOYD, by Their
Guardian *ad Litem*, JOSEPHINE BOYD,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY
and HENRY HOLMES, Trustees under the
Will of JOHN J. SULLIVAN, HENRI-
ETTA SULLIVAN, JOHN BUCKLEY,
PRISCILLA ALBERTA SULLIVAN
CLARKE and ROBERT KIRKWOOD
CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WAL-
TERS CLARKE, a Minor,
Defendants in Error.

**Certificate of Clerk to Transcript of Record and
Return to Writ of Error.**

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme
Court of the Territory of Hawaii, in obedience to the

writ of error, the original whereof is herewith returned, being pages 139 to 141, both inclusive, of the foregoing transcript, and in pursuance of the praeceipe to me directed, a copy whereof is hereto attached, being pages 145 to 146, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 138, both inclusive, AND I CERTIFY the same to be full, true and correct copies of the pleadings, entries, testimony and final judgment which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii in the above-entitled case, Numbered 879 and 913; [149]

I DO FURTHER CERTIFY that the original citation on writ of error and acknowledgment of receipt of a true copy thereof by Messrs. Frear, Prosser, Anderson & Marx, being pages 142 to 144, both inclusive, and the original Order Extending Time for Preparation and Transmission of Record, being pages 147 to 148, both inclusive, of the foregoing transcript of record, are hereto attached and herewith returned;

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$55.70, and that the said amount has been paid by Lorrin Andrews, Esq.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 8th, day of June, A. D. 1916.

[Seal]

JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii. [150]

[Endorsed]: No. 2818. United States Circuit Court of Appeals for the Ninth Circuit. Mary Kaleialii, Rebecca Lehia Miles and Annie K. Boyd, and Robert N. Boyd, and Victor K. Boyd, by Their Guardian *ad Litem*, Josephine Boyd, Plaintiffs in Error, vs. Henrietta Sullivan, John Buckley and Henry Holmes, Trustees Under the Will of John J. Sullivan, Henrietta Sullivan, John Buckley, Priscilla Alberta Sullivan Clarke, and Robert Kirkwood Clarke, a Minor, Juanita Ellen Clarke, a Minor, and Thomas Walters Clarke, a Minor, Defendants in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed June 20 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD and ROBERT N. BOYD
and VICTOR K. BOYD, by their Guardian ad
Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and
HENRY HOLMES, Trustees under the Will of
John J. Sullivan, HENRIETTA SULLIVAN,
JOHN BUCKLEY, PRISCILLA ALBERTA
SULLIVAN CLARKE and ROBERT KIRK-
WOOD CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WALTERS
CLARKE, a Minor.

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

In Error to the Supreme Court of the Territory of
Hawaii.

ANDREWS & PITTMAN and FRANK ANDRADE,
Attorneys for Plaintiffs in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA
MILES and ANNIE K. BOYD and
ROBERT N. BOYD, and VICTOR K.
BOYD, by their Guardian ad Litem,
JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCK-
LEY and HENRY HOLMES, Trustees
under the Will of John J. Sullivan,
HENRIETTA SULLIVAN, JOHN
BUCKLEY, PRISCILLA ALBERTA
SULLIVAN CLARKE and ROBERT
KIRKWOOD CLARKE, a Minor,
JUANITA ELLEN CLARKE, a Minor,
and THOMAS WALTERS CLARKE, a
Minor,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

This is an action to quiet title brought in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which the Plaintiffs in Error were the plaintiffs and the Defendants in Error were the defendants. The action to quiet title in the Territory of Hawaii being a statutory one and brought on the law side of the court, was tried before the Honorable T. B. Stuart, Third Judge of the Circuit Court

of the First Judicial Circuit, Territory of Hawaii, sitting without a jury. It appeared from the evidence in the case that one, Alexander Adams, Jr., was the owner of the property in question and on September 15, 1858, he made a deed to his daughters, Peke and Maria, of a large number of properties, including the property in question. This deed was in the Hawaiian language, a translation of which was offered in evidence. (See pages 77 and 78 of Transcript and also page 40 of Transcript for a translation of the Adams deed.) It further appeared from the evidence that the said daughters executed deeds of said land and, by mesne conveyances, it became the property of the defendants; that the said Maria died in 1894, having been out of possession of said land for many years; that the said Peke died on the 5th day of June, 1914, leaving surviving her two children, namely, Mary Kaleialii, one of the plaintiffs, and Robert N. Boyd, who died on September 9, 1914, leaving surviving him four children, the other plaintiffs herein. The claim of the plaintiffs was that the deed of Alexander Adams, Jr., to his daughters was a deed of a life estate only in the lands in question with remainder to their children and that, regardless of the action of Peke in conveying said land, the title was vested in her children upon the death of said Peke. Upon the conclusion of the case, the judge reserved decision and thereafter ordered that the construction of said deed be submitted to the Supreme Court of the Territory of Hawaii on reserved questions of law. (See

Transcript of Record, page 30.) In accordance with said order of the court, the following questions were reserved to the Supreme Court of the Territory of Hawaii:

1. What interest or estate in said land did said deed from Alexander Adams, Jr., convey to said Peke?
2. What interest or estate, if any, in said land did said deed from Alexander Adams, Jr., convey to such children, if any, of Peke as are referred to in said deed?

The Supreme Court of the Territory of Hawaii in an opinion rendered on the 9th day of November, 1915, rendered the following decision on the reserved questions:

“We are of the opinion that the deed from Alexander Adams, Jr., to his daughters, Peke and Maria, gave them each a fee simple in an undivided one-half of the land.” (See pages 51 to 61 of Transcript of Record.)

Thereafter, a decision was rendered by the Honorable T. B. Stuart, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which he held that the questions decided by the Supreme Court were decisive of the case, and judgment was rendered in favor of the defendant. (See page 63, Transcript of Record.) Upon this decision, a judgment of the Circuit Court was entered in favor of the defendants and against the plaintiffs. (Pages 64 and 65 of Transcript of Record.) From this judgment a writ of error was issued returnable

to the Supreme Court of the Territory of Hawaii (see page 146, Transcript of Record) and judgment was entered in the Supreme Court of the Territory of Hawaii in favor of the defendants in error and against the plaintiffs in error, on the ground set forth in the former decision of the Supreme Court upon the reserved questions of law. From this decision a writ of error was taken returnable to the United States Circuit Court of Appeals for the Ninth Circuit on the following assignments of error:

I.

The court erred in sustaining the Circuit Court of the First Judicial Circuit in construing the deed of Alexander Adams, Jr., dated September 15, 1858, offered in evidence as Exhibit "A" in said case, as conveying to Peke and Maria, his daughters, an estate in fee, giving to each an undivided one-half ($\frac{1}{2}$) of the land set forth in said deed. Said construction so given by said Circuit Court was and is contrary to law, contrary to the evidence in the case and contrary to the intent of said grantor, as gathered from and shown by the deed in its entirety, and which construction thereof, by said Circuit Court, was and is prejudicial to the rights of the plaintiffs in error, and erroneous.

II.

The court erred in sustaining the Circuit Court of the First Judicial Circuit in deciding in favor of the defendants in error and in rendering and enter-

ing judgment in favor of the defendants in error and against the plaintiffs in error, to which the plaintiffs in error duly excepted.

ARGUMENT.

The only question before this court is: Did the Supreme Court of the Territory of Hawaii err in construing the deed of Alexander Adams, Jr., to his daughters, Peke and Maria, dated the 15th day of September, 1858? This deed, as has been formerly stated, was in the Hawaiian language, a translation of which, as offered in evidence, is as follows:

This deed is an absolute conveyance of the land made this 15th day of September in the year of our Lord One Thousand Eight Hundred and Fifty-eight between Alexander Adams, Jr. of Honolulu, Island of Oahu, the party of the first part, and Peke and Maria, his daughters, of the same place, of the second part.

WITNESSETH: That the above named Alexander Adams, Jr., of his own volition, in order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance. And Whereas, the said Alexander Adams, Jr. because of his own desire for the aforesaid daughters that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed

and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter, providing no conveyance is made to their husbands.

Now therefore this deed showeth that the above mentioned Alexander Adams, Jr. in consideration of the statements herein made and of two dollars paid into his hands by the parties of the above mentioned second part which has been received in witness of the making, sale, giving, conveying, releasing, effectuating and confirming, therefore, by this deed, do make, sell, give, convey, release, effectuate and forever quit claim to the parties of the second part hereinabove mentioned all those certain pieces of land situate at Olomana, Honolulu, and the house lot situated in the town of Honolulu, along Hotel Street (L. C. A. 5049B to Keoki no Malule; deeded to me on the 3rd day of August, 1854, Royal Patent 1918, acknowledged on the 11th day of April, 1855, and also Grant 2349 and 2530 signed on the 8th of April, 1857 and the 14th day of September, 1858, and the house lot sold to me by deed from Alexander Adams, signed on the 22nd day of June, 1850, and acknowledged by A. Bates on the 22nd day of August, 1850, the descriptions of which are as follows:

4 Taro patches in Olomana (L. C. A. 5049B

R. P. 1918). Commencing at the north corner of this land and surveyed as follows:

South 33° E. 206 links along Kaholo;

South 49° W. 198 links along Government;

North 29° W. 277 links along Government
dry land

North $35\frac{1}{2}^{\circ}$ E. 31 links along Kaholo

North 61° E. 66 links along Kaholo

South 59° E. 45 links along Kaholo

North 61° E. 66 links along Kaholo

South 59° E. 45 links along Kaholo

North 70° E. 64 links along Kaholo to the
place of commencement. The area
is 47/100 acres.

2 Taro patches (Grant 2349). Commencing at the south corner of this and running

North 53° E. along the stream 189 links;
thence

North 37° W. 125 links along Government,
thence

South 49° W. 50 links, thence

North 29° W. 283 links along Keoki, thence

South $60^{\circ} 50'$ W. 44 links, thence

South $55^{\circ} 0'$ W. 113 links along Kaholo,
thence

South $32^{\circ} 0'$ W. 342 links, thence

South $47^{\circ} 0'$ E. 73 links along land of Paia
to the point of beginning contain-
ing 46/100 acres.

4 Taro patches and dry land (Grant 2530). Commencing at the west corner makai of this

land at the north west corner of stream along the land of Napunako and Paia and running:

South 46° E. 765 links along Paia, thence

North $39^{\circ} 30'$ E. 285 links along Awaio-limu,

North $23^{\circ} 30'$ W. 670 links along Kaloko-honu to the opposite side of stream

South $68^{\circ} 30'$ W. 62 links along Papamakua

North $34^{\circ} 0'$ W. 87 links along Papamakua

South $54^{\circ} 30'$ W. 140 links along Papamakua

South $30^{\circ} 30'$ E. 75 links along Kaholo

South $60^{\circ} 30'$ W. 46 links along Kaholo

North $36^{\circ} 30'$ W. 141 links along Kaholo

South $47^{\circ} 30'$ W. 140 links along Napunako

South $36^{\circ} 0'$ E. 124 links along Napunako

South $55^{\circ} 30'$ E. 191 links along Napunako to the place of commencement containing $3 \frac{18}{100}$ acres.

House lot along Hotel Street in the City of Honolulu, the land commission of which is issued to Alexander Adams, which was sold to me on the 22nd day of June, 1850, copied in Government Registry of Conveyances, Buke 4, page 214, on the 22nd day of August, 1850.

Commencing at John Duke's house along the street south east by east $1\frac{1}{2}$ E 46.6 feet, thence N. E. $1\frac{1}{2}$ N 62 feet, thence N W by W 44 feet, thence S W $1\frac{1}{2}$ W 72 feet to the place of commencement.

To have together with the things thereupon the houses and appurtenances, rights, and priv-

ileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interest and rights appertaining to the party of the first part (shall belong to Peke and Maria and to their representatives and heirs and assigns forever.

And the above mentioned Alexander Adams, Jr. and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr. of the first part and to his heirs and the benefits shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner as enjoyed by their parents.

Provided that if one of the parties of the second part shall die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them.

The parties of the second part hereinabove set forth do hereby witness under oath and by affirmation as well to all the contents of this deed and do hereby bind and both consent to and with the party of the first part hereinabove

mentioned to ratify and certify and to bond and execute to the truth of this deed as well as to all the conditions herein contained.

In witness whereof I hereby sign with my hand and seal this day and the year first above written.

(Sgd) Alexander Adams, Jr.

Made, signed and sealed in the presence of

(Sgd) J. L. Mailili

“ Kaaiahua.

Register Office, Oahu, September 15th, 1858, personally appeared before me Alexander Adams, Jr. and acknowledged that he executed the foregoing instrument for the uses and purposes therein set forth.

(Sgd.) Thomas Brown,
Deputy Registrar of
Conveyances.

Received and compiled the 15th day of September, A. D. 1858, at 3/4 past two o'clock P. M.

(Sgd.) Thomas Brown,
Deputy Registrar of
Conveyances.

The plaintiffs claim that by a fair construction of the above and foregoing deed to his two daughters “Peke” and “Maria,” Alexander Adams, Jr. created in each one of the said grantees an estate for the life of each one of them with a remainder over to their children, if any such children should survive the mother or mothers.

The court will find the following paragraphs con-

tained in the deed in question, in the order in which they appear in said deed :

“That the above named Alexander Adams, Jr. of his own volition, IN ORDER TO PROVIDE FOR HIS DAUGHTERS PEKE AND MARIA SO AS TO PREVENT UNAVOIDABLE INCONVENIENCE AND FOR THE CARE OF THEIR PERSONS WITH THINGS NECESSARY AS WELL AS THEIR MAINTENANCE. And whereas, the said Alexander Adams, Jr. BECAUSE OF HIS OWN DESIRE FOR THE AFORESAID DAUGHTERS THAT THEY MAY BE BENEFITED WITH THE PROCEEDS ARISING THEREFROM TOGETHER WITH THE RENTS TO THEIR CHILDREN AND ASSIGNS AS WELL AS THE PAYMENTS TO BE MADE FOR THE REAL ESTATE hereunder conveyed and described premises TO THE END OF THEIR LIVES AND FOREVER TO THEIR HEIRS, INDEPENDENT OF ALL RESTRAINING and interference of their husbands or those they may have hereafter, providing no conveyances is made to their husbands.”

“Now therefore this deed showeth that the above mentioned Alexander Adams, Jr. IN CONSIDERATION OF THE STATEMENTS HEREIN MADE and of two dollars paid into his hands by the parties of the above-mentioned second part which has been received in witness of the making, sale, giving, conveying, releasing, effectuating and confirming, therefore, by this deed, do make, sell, give, convey, release, effectuate and forever quit claim to the parties, etc.”

“To have together with the things thereupon the houses and appurtenances, rights, and privileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interest and rights appertaining to the party of the first part shall belong to Peke and Maria and to their representatives and heirs and assigns forever.”

“And the above mentioned Alexander Adams, Jr. AND UNTIL THE DECEASE OF HIS DAUGHTERS THEY SHALL LEAVE THESE LANDS AND RIGHTS APPERTAINING TO WHOMSOEVER THEY MAY DEMISE, PROVIDING IT BE DONE IN TRUTH AND HONESTY, but SHOULD IT NOT BE MADE IN ACCORDANCE WITH THE ABOVE SUCH AS THE CONVEYANCES AND THE ACKNOWLEDGMENT THEREOF, THEN IN SUCH CASE THESE LANDS SHOULD REVERT TOGETHER WITH ALL APPURTENANCES TO ALEXANDER ADAMS, JR. OF THE FIRST PART AND TO HIS HEIRS AND THE BENEFITS SHALL ONLY BE THEIRS PROVIDING THE SECOND PARTY HAVE NO CHILDREN. BUT IN THE EVENT THAT THE PARTIES OF THE SECOND PART HAVING CHILDREN ALL THE RIGHTS SHALL DESCEND TO THEM IN THE MANNER AS ENJOYED BY THEIR PARENTS.

“PROVIDED THAT IF ONE OF THE PARTIES OF THE SECOND PART SHOULD DIE WITHOUT ANY ISSUE LIVING AT THE TIME, ALL THE RIGHTS ABOVE MENTIONED SHALL DESCEND TO THE SURVIVOR OF THEM.”

The first paragraph quoted from said deed and which constitutes a part of the premises thereof expresses and makes plain the grantor's intention:

“In order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their persons with things necessary as well as their maintenance.”

This portion of the Adams deed clearly indicated that the personal welfare and being of the grantees was the prime object which moved the grantor in the making of said deed.

“To prevent unavoidable inconvenience and for the care of their persons with things necessary as well as their maintenance.”

And the following in the same paragraph:

“That they may be benefited with the proceeds arising therefrom together with the rents to their CHILDREN and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs.”

Up to this point it is clearly manifest that Alexander Adams, Jr., intended that his daughters Peke and Maria should have the proceeds and rents arising from the land described in said deed for their lives only. While it is found that the grantor in the premises employs the term “children” and at another, the term “heirs,” the early part of the premises wherein he expresses the purpose for which said conveyance was made states:

“In order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance.”

This, we submit, shows a clear intention to limit the estate granted to a life interest.

Again in the granting clause of said deed and as a part of the consideration therefor, he reiterates his purpose by saying: “In consideration of the statements herein made”; and then follows the granting words of said deed, which are in the usual form.

Then follows the Habendum which, if read and considered by itself, would probably defeat the contention of these plaintiffs. This is, however, immediately followed, not by a covenant or complete reddendum, but by statements explanatory of the tenure by which the lands were to be held by Peke and Maria, as follows:

“And the above mentioned Alexander Adams, Jr. AND UNTIL THE DECEASE OF HIS DAUGHTERS THEY SHALL LEAVE THESE LANDS AND RIGHTS APPERTAINING TO WHOMSOEVER THEY MAY DEMISE, PROVIDING IT BE DONE IN TRUTH AND HONESTY, BUT SHOULD IT NOT BE MADE IN ACCORDANCE WITH THE ABOVE SUCH AS THE CONVEYANCE AND ACKNOWLEDGMENT THEREOF. THEN IN SUCH CASE THESE LANDS SHOULD REVERT TOGETHER WITH ALL APPURTENANCES TO ALEXANDER ADAMS, JR. OF THE FIRST PART AND TO HIS HEIRS AND THE BENEFITS SHALL ONLY BE THEIRS PROVIDING THE SECOND PART HAVE NO CHILDREN, BUT IN THE EVENT THAT THE PARTIES OF THE SECOND PART HAVING CHILDREN ALL THE RIGHTS SHALL DESCEND TO THEM IN THE MANNER AS ENJOYED BY THEIR PARENTS.”

If there should be any doubt as to the construction which should be placed on this deed relative to the quantum of interest or estate conveyed to Peke and Maria, the paragraph just quoted is surely decisive.

“And until the decease of his daughters they shall leave these lands to whomsoever they may demise, providing it be done in truth and honesty.”

This portion of the paragraph only means that a demise of this property, if done honestly and not for the purpose of defeating the rights of such children as might survive the parent, well and good; otherwise, the grantor says:

"Then in such case these lands should revert together with all the appurtenances to Alexander Adams, Jr."

Here, Alexander Adams, Jr., limits the dealings of his daughters up to and "until their decease," and this to be done with truth and honesty, and if they, Peke and Maria, should attempt to do otherwise, the lands should revert to the grantor or his heirs, and in case of an attempt on the part of Peke and Maria to convey more than the estate given them, then and in that case, after the provision for a reverter, he says: "and the benefits only shall be theirs."

This surely means that by attempting to defeat their children, Peke or Maria would again only be entitled to the benefits, meaning, the use of said property for their lives.

And again we notice in the same paragraph, after the statement relative to a possible reverter, the following:

"Providing the second part have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the same manner as enjoyed by their parents."

To further explain himself and to make it clear

that he only intended to create a life estate in his daughters Peke and Maria, Alexander Adams, Jr., adds the following paragraph:

“Provided that if one of the parties of the second part should die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them.”

If there is any uncertainty or ambiguity in the deed in question relative to the quantum of estate which became vested in Peke or Maria, or in both of them, this last paragraph surely should be conclusive.

It must be remembered that this deed was not written in the English language, but in Hawaiian, and, therefore, the intention, as expressed by reading the deed as a whole, should be the final criterion by which to judge the wish or desire of the grantor, rather than English words which, used in the translation, may not have been intended to carry the whole force and effect that an original deed in English would give to them; but are simply employed in their Hawaiian equivalent to express the formal parts of a deed.

In this connection we desire to say that the Adams' deed was prepared in Hawaiian, presumably by a Hawaiian, only a quarter of a century after civilization was introduced into these Islands, also a short time after education had even in a slight degree been established here, and just ten years after land tenures were established and recognized in Hawaii, therefore we most respectfully submit that the rigid rules of legal construction adopted by the courts of

the mainland of the United States and England, where for centuries profound learning and education has been established, should not altogether govern in this case.

“The intent of the parties to a deed, when it can be obtained from the instrument, will prevail unless counteracted by some rule of law. The intention of the parties is to be ascertained by considering all of the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practicable, when not contrary to law.”

Nahaolehua vs. Heen, 20 Haw. 377.

We again observe Alexander Adams, Jr., by the premises of his deed is conveying to his two daughters the lands in question only “TO THE END OF THEIR LIVES and forever to their heirs, independent of all restraining and interference, etc.”. The premises of said deed is followed by a paragraph commonly used in conveyancing and which, according to the case of *Budd vs. Brooke*, 43 Am. Dec. 337, is a part of the premises.

“The technical meaning of the word “premises,” in a deed of conveyance, is everything which precedes the habendum; and it is in the premises of a deed that the thing is really granted. The premises of the grant before us, passing, as we conceive, the lands granted in conformity to the last will and testament of Thomas Brooke, and the declared intent of both grantor and grantees, the next inquiry to be answered is, has the habendum such controlling influence over the grant as to defeat the estates created by the premises, and substitute, in their places, entirely different estates, contrary to the manifest intent of the parties to the grant? According to our construction of the grant, made by the premises, it is in

direct conflict with that contained in the habendum. Both can not prevail. One must overrule the other. Which takes precedence, is the question. **IN OUR OPINION, THE LIMITATION CONTAINED IN THE HABENDUM MUST BE REJECTED,** and the estate given in the premises must prevail."

Budd vs. Brooke, 43 Am. Dec. 337-8.

"The intent, when apparent and not repugnant to any rule of law, will control technical terms, **FOR THE INTENT, AND NOT THE WORDS, IS THE ESSENCE OF EVERY AGREEMENT.** In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect." And if a deed cannot take effect in the precise way intended, yet if it can operate in another mode it will be so construed."

Devlin on Deeds, Sec. 837.

See also *Bent vs. Rogers*, 137 Mass. 192.

"In *Coleman vs. Beach*, 97 N. Y. 545, 553, Mr. Chief Justice Ruger, in delivering the opinion of the court, said: "If the disposition which the owner of the property desires to make does not contravene any positive prohibition of law, his control over it is unlimited, and the only office which the courts are called upon to perform in construing his transfers of title, is to discover and give effect to his intentions. In the case of repugnant dispositions of the same property contained in the same instrument, the courts are of necessity compelled to choose between them; but it is only when they are irreconcilably repugnant that such a disposition of the question is required to be made. If it is the clear intent of the grantor that apparently inconsistent provisions shall all stand, such limitations upon, and interpretations of the literal signification of the language used, must be imposed, as will give some effect if possible to all of the provisions of the deed."

Devlin on Deeds, Note, Sec. 837.

If a question of law arises upon the construction of a deed, it is the province of the court to construe it and to decide from the language what the intention of the parties was. When the intention of the parties can be plainly ascertained, arbitrary rules are not to be resorted to. The rule is that the intention of the parties is to be ascertained by considering all of the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practicable when not contrary to law."

Devlin on Deeds, Sec. 836.

"It is evident that the common law rule is generally recognized that "In case of a clear repugnancy between the premises and the habendum, the premises will prevail to the extent that an estate created in the granting clause cannot be cut down or invalidated by limitations in the habendum."

2 Tiffany Law of Real Property, 870.

Simerson vs. Simerson, 20 Haw. 65.

If the above stated rule of law is adopted in this case, "there being a clear repugnancy between the premises and the habendum, the premises will prevail, etc.," then the court will disregard the habendum, and, for the sake of argument, if the habendum should be eliminated from consideration, the paragraph following the said habendum is surely conclusive of the grantor's intention to create but a life estate in each of his daughters.

In the paragraph following the habendum, Alex-

ander Adams, Jr., vests his daughters with the power of appointment, "providing it be done in truth and honesty," but upon a failure to do so, "then in such case, these lands shall revert together with all appurtenances to Alexander Adams, Jr. of the first part and to his heirs and the benefits only be theirs providing the second part have no children, BUT IN THE EVENT THAT THE PARTIES OF THE SECOND PART HAVING CHILDREN ALL THE RIGHTS SHALL DESCEND TO THEM in the manner as enjoyed by their parents." The intention of the grantor is again made clear, that he intended only a life estate to vest in each of his daughters, for he says: "Provided that if one of the parties of the second part shall die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them."

"It is not the practice of courts of justice to divest persons of their estates by a rigid adherence to the rules of grammatical construction, or by a strict interpretation of the language of an instrument, when the sense in which the words were used is apparent from other portions of the instrument viewed in the light of the attending facts. The sole object to be obtained in the construction of contracts is to ascertain the real intention of the parties; and with this view the whole contract and all its provisions, together with the relations of the parties towards each other, will be considered; and effect will be given to the intent thus ascertained, however clumsily the instrument may be worded, and however grossly it may violate the strict rules of grammatical construction."

Devlin on Deeds, 843.

The Supreme Court of Hawaii cites as authority for deciding this case against the plaintiffs in error, the decisions in the cases of *Simerson vs. Simerson*, 20 Haw. 57; *Nahaolehua vs. Heen*, 20 Haw. 372, 377, and *Ray vs. Spears*, 64 S. W. 413.

The ruling in these cases should not be decisive against plaintiffs in error in the case at bar, for, in all of them, both the granting and habendum clauses of the deeds conveyed the fee forever in as strong language as could be used; then adding terms or conditions which are limitations converting the title into defeasible fees, the court saying (*Ray vs. Spears Exr.*, 64 S. W. 413) : "It seems to us that the attempt to so limit the absolute grant is null and void, because utterly inconsistent with BOTH THE GRANTING and habendum clauses in the conveyance."

The deed now under consideration from its beginning to the habendum clause indicates clearly that it was not the intention to vest Peke and Maria with a fee simple estate in these lands, for Alexander Adams, Jr., says that his daughters may have these lands "to the end of their lives and forever to their heirs"; and in this connection, we desire to call the court's particular attention to the fact that the term "heirs," "children" and "issue" are used in the Adams deed synonymously.

"A construction which requires us to reject an entire clause of a deed is not to be admitted, except from unavoidable necessity; but the intention of the parties, as manifested by the language employed in the deed, should, so far as practicable, be carried into effect."

Riggin et al. vs. Love et al., 72 Ill. 556.

City of Alton vs. Ill. Trans. Co., 12 Ill. 56.

Poole vs. Blakie, 53 Ill. 500.

“It is well settled that the granting clause in a deed must prevail over the habendum, unless a contrary intention is shown by the deed. In this case both the granting and habendum clauses of the deed convey the fee forever in as strong language as could be used; and, after certain other property is conveyed, the addition to or condition is added which it is claimed is a limitation or which converts the title into a defeasible fee. It seems to us that the attempt to so limit the absolute grant is null and void, because utterly inconsistent with both the granting and habendum clauses of the conveyance.”

Ray vs. Spears' Exr., 64 S. W. 414.

“A deed is to be so construed, if possible, as to give effect to it as a conveyance of some interest of the grantor in the lands therein described, and if a clause is therein found which is repugnant to the general intention of the deed, it is to be rejected as void.”

Wilcoxon vs. Sprague, 51 Cal. 642.

Carllee vs. Ellsberry, 82 Ark. 209, 101 S. W. 407.

“A deed conveyed to the grantee ‘and her heirs and assigns forever, a certain piece or parcel of land, situated, lying and being in Halifax, and is the same farm on which (the grantor) now lives; that is to say, one undivided half of the same, with the buildings thereon, with the privileges and appurtenances thereto belonging, * * * always provided that in the event of her decease, the same shall revert to me, if living, if not, to my heirs, being the same farm which I purchased from Darius Plumb.’ The haben-

dum was to the grantee, 'and her heirs and assigns, to her and their own proper use, benefit and behoof forever.' The deed contained the usual covenants of warranty, seisin, and against encumbrances, and also this clause following the covenants: 'Always reserving the reversion to myself and heirs, as stipulated in the deed.' The court held that the manifest intent was to convey an estate for life, and not an estate in fee, and the deed must take effect according to such intent."

Devlin on Deeds, Sec. 836.

The above statement from Devlin on Deeds is strongly supported in every particular by the following cases:

Flagg vs. Eames, 40 Vt. 16.

Collins vs. Lavelle, 44 Vt. 230;

Colby vs. Colby, 28 Vt. 10.

It is respectfully submitted that the decision in the case of *Flagg vs. Eames*, Supra, quoted in Devlin on Deeds, Supra, bears out exactly the contentions of the plaintiffs in error. The habendum clause is no stronger than the habendum clause of the deed in the case at bar, yet the entire wording of the deed was taken by the court as showing the intent to be to grant a life estate rather than the granting of a fee, as shown in the habendum. When again it is taken into consideration, as formerly argued, that the deed in the case at bar was written in the Hawaiian language, where the translated English words should not be given their technical meaning, but where the intent of the person making the deed should be considered in order that justice should be

done in the construction of the instrument, we submit that the ruling of the Supreme Court of the Territory of Hawaii against the intent of this instrument and in favor of a construction which insists upon the technical wording of a portion of the same should be reversed and judgment should be rendered in favor of the plaintiffs in error.

Respectfully submitted,

ANDREWS & PITTMAN,

FRANK ANDRADE,

Attorneys for Plaintiffs in Error.

Dated, Honolulu, T. H.,

September 12, A. D. 1916.

United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD and ROBERT N. BOYD,
and VICTOR K. BOYD, by their Guardian ad
Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and
HENRY HOLMES, Trustees under the Will of
John J. Sullivan, HENRIETTA SULLIVAN,
JOHN BUCKLEY, PRISCILLA ALBERTA
SULLIVAN CLARKE and ROBERT KIRK-
WOOD CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WALTERS
CLARKE, a Minor,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE SUPREME COURT OF THE
TERRITORY OF HAWAII.

HOLMES & OLSON,
FREAR, PROSSER, ANDERSON & MARX,
E. B. McCLANAHAN,
S. H. DERBY,
Attorneys for Defendants in Error.

Filed

OCT 2 1903

H. B. Appleton

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE
NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD and ROBERT N. BOYD,
and VICTOR K. BOYD, by their Guardian ad
Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and
HENRY HOLMES, Trustees under the Will of
John J. Sullivan, HENRIETTA SULLIVAN,
JOHN BUCKLEY, PRISCILLA ALBERTA
SULLIVAN CLARKE and ROBERT KIRK-
WOOD CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WALTERS
CLARKE, a Minor,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

Both plaintiffs and defendants in error claim title to the land in question from a common source, namely, the deed of September 15, 1858, from Alexander Adams, Jr., to his daughters Peke and Maria. (R., pp. 40-44).

The plaintiffs in error claim that that deed gave only a life estate in one-half of the land to each of the grantees (Peke and Maria) with remainders in fee simple to their respective children, and that on

the death of Peke on July 5, 1914, her life estate ended and a remainder in fee simple in her half of the land became vested in her two surviving children, namely, Mary Kaleialii (one of the plaintiffs) and Robert N. Boyd, who was the only other original plaintiff but upon whose death, after the commencement of the action, his children were substituted in his place as co-plaintiffs with Mary Kaleialii.

The defendants in error claim that the deed to Peke and Maria gave them each a fee simple in half of the land and that Peke's interest passed to Maria by her two deeds of 1868 and 1885, and that the fee simple in both halves or the whole of the land passed by subsequent deeds from Maria through Robertson and Bolte to the defendants, who have been in undisturbed possession, claiming under such deeds a fee simple title to the whole land and expending large sums in improvements on the land for the last thirty years.

I.

This case may easily be decided on a question of law, namely, the construction of the deed from Adams to Peke and Maria, and that too by the application of elementary and well established principles, which have been applied repeatedly in recent decisions of the Supreme Court of the Territory of Hawaii, from whose decision in this case this appeal comes.

The grant and habendum of this deed clearly con-

vey to Peke and Maria an estate in fee simple. Counsel for plaintiffs in error admit this by their statements: "And then follows the granting words of said deed which are in the usual form." (Brief of Plaintiffs in Error, p. 13, last 3 lines.) "Then follows the habendum which if read and considered by itself would probably defeat the contention of these Plaintiffs." (Brief of Plaintiffs in Error, p. 14, first 3 lines.)

Certain other parts of the deed also show that this was the intention, and upon all of these, defendants rely. Certain expressions of a more or less ambiguous and inconsistent character, if detached from the context, seem to indicate that under certain contingencies the grantees were intended to take only a life estate. The plaintiffs rely on these expressions.

It is true that in construing a deed as well as a will the court endeavors to ascertain and carry out the intention of the parties. This of course means the intention as expressed by the words of the instrument. *Mercer vs. Kirkpatrick*, 22 Haw. 644; *Smith vs. Lucas* (1881), 18 Ch. Div. 531; *In re Fish*, *Ingham vs. Raynor* (1894), 2 Ch. 83; *Scale vs. Rawlins* (1892), A. C. 342, also cases *infra*. Even applying that rule the plaintiffs' contention should not prevail here taking the deed as a whole, but even that rule is subject to certain well established rules of law to which a grantor must conform if he would make effectual his intention.

In general, if the granting part of a deed clearly conveys a fee simple and the subsequent parts indicate that only a life estate was intended to be conveyed, the granting part will control, because that comes first and after a fee simple has been granted it can not afterwards be taken back either in whole or in part by the later provisions. If, however, the granting part is ambiguous and the later provisions are clear, the former may be explained and controlled by the latter. If the granting and habendum parts are clear and the subsequent provisions are ambiguous or inconsistent, we have the strongest case possible for giving effect to the granting part alone. That is the case in this instance. Another reason given by the courts for holding that a fee simple was conveyed is that the courts naturally lean toward a construction which will prevent the land from being tied up in the life estate and remainders and so kept out of the market.

Let us now examine the deed. (R., pp. 40-44.) It starts out in its introduction with these significant words declaratory of the general intention: "This deed is an *absolute conveyance*" from Alexander Adams, Jr., to Peke and Maria, his daughters.

Next come two recitals, the first of which is as follows:

"Witnesseth: That the above named Alexander Adams, Jr. of his own volition, in order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance."

This expresses the object of the deed to be "in order to provide for his daughters Peke and Maria." No others are mentioned. And this the property conveyed will do by providing "for the care of their person with things necessary as well as their maintenance."

Counsel are hard pressed when they say "this * * shows a clear intention to limit the estate granted to a life interest." (Brief of Plaintiffs in Error, p. 13.)

The second recital is as follows:

"And Whereas, the said Alexander Adams, Jr., because of his own desire for the aforesaid daughters that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter, providing no conveyance is made to their husbands."

Of this recital, the words "that they (Peke and Maria) may be benefited with the proceeds arising therefrom together with (that is, in addition to) the rents * * * * as well as the payments to be made for the real estate hereunder conveyed and described" are consistent only with the right to sell, which is a right attached to the ownership of the fee. If Peke and Maria could not sell, there could be no "payments to be made for the real estate conveyed" by the grantor to his daughters and probably

no "proceeds arising therefrom together with (that is, in addition to) the rents."

It will be noticed further that the words "their children and assigns" couple the "assigns" of Peke and Maria with their "children." The fact that Peke and Maria's assigns are on an equality with their children shows that no gift was intended to be made to their "children" because a gift to a man's assigns is a contradiction. A man's assign is the person to whom he (not another) gives or transfers property. The word "children" is therefore used in the sense of heirs. If any doubt about this exists so far, the words "and forever to their heirs" later in the same recital should remove it. The words "assigns" and "heirs" and the provision that they should not convey to their husbands indicate also that they might convey to others and that except for such provision they might convey to their husbands. In other words, that they have a fee simple estate.

Of course, what we are concerned to find is not what Alexander Adams, Jr., had in his mind or what he hoped to accomplish when he executed this deed, but what he by this deed did do.

What counsel ask the Court to do is to change the grant and the habendum, which are consistent with one another and which admit of one meaning only, to give effect to a few words in a recital which are inconsistent with the context and the meaning of which recital is surely ambiguous.

Then follows the granting part in which Adams doth "make, sell, grant, convey, release, effectuate

and *forever quit claim*" to his daughters the land in question.

Next comes the habendum, which is unusually full, covering not only the land and the houses and appurtenances, rights, and privileges, either in law or equity, but also "all things together with the interest and rights appertaining to the party of the first part shall belong to Peke and Maria and to their representatives and heirs and assigns forever." The last words, namely, "heirs and assigns forever," are the most usual and apt words known to the law to convey a fee simple. Moreover, this habendum expressly gives to the daughters "the interest and rights appertaining to" the grantor himself, and since he had a fee simple the same estate is given by this habendum to the daughters.

Thus the introduction, the granting part and the habendum all clearly disclose an intention to grant a fee simple; and even the recital, which is less important, points in the same direction as far as it goes.

After the habendum comes the following clause upon which plaintiffs rely:

"And the above mentioned Alexander Adams, Jr., and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr., of the first part and to his

heirs and the benefits shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner as enjoyed by their parents.

“Provided that if one of the parties of the second part shall die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them.”

(On pages 12, 14 (twice) and 15 of Brief of Plaintiffs in Error, the word “demise” should read “devise.” The same error in places appears in the Record. But on pages 43 (Reservations of Questions of Law), 53, 56 and 60 (decisions of Supreme Court of Hawaii) of the Record the correct word is used, as well as on page 9 of Brief of Plaintiffs in Error.)

The clause following the habendum does not seem to present much difficulty. It provides that the daughters shall have the right during their lives to dispose of “these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty,” that is, as he afterwards explains, “such as the conveyance and acknowledgment thereof.”

While the word “devise” is an appropriate word for a disposition of real estate by will, yet, in *Kalihihi vs. Kama*, 5 Haw. 330, it was held to mean “to pass over” to, and the words “conveyance and the acknowledgment thereof” are only appropriate to a transfer by deed. And a sale in their lifetime would be necessary to bring in “the payments to be made

for the real estate hereunder conveyed and described" mentioned in the second recital.

The meaning of the word "acknowledged" appears to have been understood by the grantor, as in the general description of the property conveyed we find these words: "deeded to me on the 3rd day of August, 1854, Royal Patent 1918 acknowledged on the 11th day of April, 1855" and "the house lot sold to me by deed from Alexander Adams signed on the 22nd day of June 1850 and acknowledged by A. Bates on the 22nd day of August, 1850." (R., p. 41.) Further, the deed itself was a conveyance acknowledged by the grantor. (R., p. 44.)

It is only in case the disposition of the lands and rights appertaining are not made in accordance with truth and honesty ("such as the conveyance and acknowledgment thereof") that "these lands" *revert* to Alexander Adams, Jr., and to his heirs, or "all the rights shall *descend*" to the children of Peke and Maria "in the manner as enjoyed by their parents." If Peke and Maria, as counsel for plaintiffs in error contend, were to enjoy life estates only, then their children could not enjoy more, and as one of Peke's two children (Robert N. Boyd) is dead, it is difficult to understand what right his children have to any share of the property, and if the grantor died intestate as to any interest in the property, Peke and Maria would inherit it as his heirs at law.

Counsel for plaintiffs admit the power of the daughters to sell and convey the property when they state (Brief, pp. 19, 20), "In the paragraph follow-

ing the habendum, Alexander Adams, Jr., vests his daughters with the power of appointment 'providing it be done in truth and honesty,' that is, not what counsel state, "if done honestly and not for the purpose of defeating the rights of such children as might survive the parents" (Brief, p. 15, 2nd, 3rd and 4th lines from top of page) but, as the grantor himself explains, "such as the conveyance and acknowledgment thereof."

That the deed recognizes the right of the grantee to sell the property is clear from the many expressions in it which are consonant only with such a construction, but strictly speaking there is no power of appointment given to the grantees, although if there were, then the daughters exercised it when they sold and conveyed the property, as the record shows they did, and counsel for plaintiffs admit they did in these words: "It further appears from the evidence that the said daughters executed deeds of said land and, by mesne conveyances, it became the property of the defendants." (Brief, p. 2, lines 11, 12, 13 and 14 from the top.)

In view of this admission it is difficult to see what right they have to ask the Court to reverse the decision of the court below. If, as they seem to think, a trust was created and the grantees were trustees for their children, as they practically admit that the grantees had the power to sell, these children must look, not to the property which was sold, but to the trustees to account for the proceeds of sale.

We shall attempt a more searching analysis of

this clause of the deed as it is the one on which plaintiffs mainly rely. It contains several clauses which may be stated simply as follows:

(a) "Until the decease of the daughters they shall leave these lands and rights appertaining to whomsoever they may devise providing it be done in truth and honesty" ("such as the conveyance and acknowledgment thereof");

(b) "But should it not be made in accordance with the above, such as the conveyance and acknowledgment thereof, then in such case these lands should *revert*, together with all appurtenances, to Alexander Adams Jr., and to his heirs and the benefits only shall be theirs, provided the second party have no children";

(c) "But in the event that the parties of the second part having children all the rights shall *descend* to them in the manner *enjoyed by their parents*"; and

(d) If either one of the daughters shall die without any issue living, "all the rights above mentioned shall *descend* to the survivor of them."

Each of these clauses contains an indication that a fee simple had been granted in the earlier part of the deed.

For instance, clause (a) shows that the daughters were to have the power until their decease to devise these lands and rights appertaining to whomsoever they please. Clause (b) shows that the fee simple ("these lands" "together with all appurtenances") was to *revert* to the grantor and his heirs only on

certain contingencies, and that if these contingencies did not happen it was to be in the grantees. If they had only an estate for life how would these lands revert to the grantor and his heirs? One of these contingencies was that the grantees should have no children. Hence, if the plaintiffs were Peke's children, that contingency did not happen. Clause (c) shows that if the daughters had children all the rights shall *descend* to them in the manner as enjoyed by their parents; in other words, that if their parents had a fee simple they were to have a fee simple, and that their parents did have a fee is clear, for there was no intention to give the children and the parents each only a life estate. Clause (d), by indicating that if one daughter should die without issue all the rights above mentioned in the deed should *descend* to the surviving daughter, shows that the rights previously mentioned were in fee simple and not an estate for life.

Again, these clauses are inconsistent with each other. For instance, Clause (a) recognizes the right of the daughters to devise "these lands and rights appertaining to whomsoever" they please, whether they leave any children or not, while Clause (d) provides that if one of them leave no children these rights should descend to the other whether she attempted to devise the land or not. Again, Clause (b) provides that if they leave no will and no children the lands should revert to the grantor, while Clause (d) provides that in the same event the land should descend to the survivor.

The only clause under which the plaintiffs could pretend to claim directly is Clause (c), but this is at least uncertain in its meaning. The plaintiffs contend that if one of the daughters should leave children the land would go to those children by way of remainder rather than by way of descent, although the word in the deed is "descend." If this clause did mean that, it could not be given effect because it would be inconsistent with the granting and other earlier parts of the deed. But it may just as well mean merely that this clause was intended to declare the result, as understood by the grantor, of the granting and other earlier parts of the deed. In other words, while the grantor may have tried to place some restrictions on the daughters by Clause (b), he in this clause (c) merely declared what he had already indicated in the earlier parts of the deed, that if the daughters had children their estate would naturally descend to them in the manner enjoyed by their parents, and if their parents had a fee simple, of course the children would take a fee simple by descent from them—if the parents did not dispose of the fee by will or deed. The use of the word "descend" in the deed in the two clauses (c) and (d) certainly supports this view. The children were to take only in the manner enjoyed by their parents, and if their parents took only a life estate they would similarly take only a life estate. That would be the conclusion from the plaintiffs' argument—a conclusion which the plaintiffs themselves would hardly welcome. In that case, Robert Boyd,

one of the children, having died, his life estate, if he had one, has ended.

The burden of the plaintiffs' argument, indeed, seems to be, not so much that a fee simple was given directly to them as that only a life estate was given to Peke and that therefore by inference a remainder in fee must have been intended for her children, an unwarranted inference.

The plaintiffs contend also that resort should be had to the Hawaiian version of the deed. We cannot see that this would help them any. However, the translation was agreed upon by the parties as correct. It is the translation which the plaintiffs themselves made a part of their complaint.

Thus we have the unusually strong case for the defendants of the granting part, the habendum and other earlier parts of the deed clearly granting a fee simple, the plaintiffs attempting to overcome these clear earlier parts by the selection of a few words from a later clause which is inconsistent and ambiguous and which, as we have shown, is not in accord with their theory that a mere life estate was given by Alexander Adams to Peke and Maria.

We shall now deal with the authorities quoted by counsel in support of their contention.

Nahaolelua vs. Heen, 20 Haw. 377:

Surely the intent of the deed in question was to convey an estate in fee simple to the grantor's daughters, Peke and Maria. The grant and the habendum have no other meaning, as counsel admit. And the

recitals as well as the clause following the habendum contain clauses which are quite consistent with such an estate, which gives complete power of alienation. It is only in case they do not exercise the right to leave the property to whomsoever they may devise, which they have during their lives ("until the decease of his daughters") in truth and honesty ("such as the conveyance and the acknowledgment thereof"), that the land reverts to the grantor. It has not been shown nor can it be shown that the conveyance by which the land was conveyed by Peke and Maria to their grantee was not truthfully and honestly conveyed and acknowledged.

Budd vs. Brooks, 43 Am. Dec. 337-8:

In the above case the deed recited, or, to use the words of the decision, the deed "states in substance that the grantees had applied for the grant to be issued to them agreeably to the devise or 'bequest' in the last will and testament of Thomas Brooke and that the grantor had agreed to make the grant accordingly. And it proceeds to state that 'therefore in consideration' thereof, that is, in pursuance of such intent and agreement, the grantor did 'give, grant and confirm unto the grantees the aforesaid tracts or parcels of escheat land now re-surveyed with the vacancy added reduced into one entire tract and called Nonesuch and bounded as follows'." The habendum was as follows: "To have and to hold the same unto the said Sarah Brooke, Walter Brooke and Richard Brooke their heirs and assigns forever

to be holden of us and our heirs in free and common socage by fealty only." The decision shows that if the habendum had controlled, the grantees were joint tenants and on the death of Sarah and Richard "then the lands so granted devolved upon the said Walter," by survivorship. The court, however, held that there was a conflict between the grant (which conveyed to the grantees as tenants in common) and the habendum, and that the limitation contained in the habendum must be rejected. In the case before the Court there is no conflict between the grant and the habendum.

Bent vs. Rogers, 137 Mass. 192:

We have read this case with care, but do not see its relevancy to the question before the Court.

Devlin on Deeds, Sec. 837:

In this section, 837, of the second edition, we find the following sentence, although it is not specifically referred to by counsel for appellants:

"If the deed contains a clause decisively showing the intention of the parties, ambiguities and inconsistencies in other clauses of the deed will not defeat such intention. As said by Lord Wensleydale, 'The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words of that deed, a most important distinction in all classes of construction and the disregard of which often leads to erroneous conclusions'."

If language has any meaning, it is clear that what Alexander Adams, Jr., did by the deed under con-

struction was to convey an estate in fee simple in the lands mentioned in the deed to his daughters, Peke and Maria. The grant and the habendum have no other meaning. What counsel ask is that the Court take a part of a recital (which might be resorted to in the case of a conflict between the grant and the habendum to explain what was not clear), a recital which is surely ambiguous and inconsistent in itself, and a clause subsequent to the habendum which is ambiguous, inconsistent, and as helpful to the defendants as to plaintiffs, and use them to defeat the words of the deed whose province it is to convey and mark off the estate to be conveyed.

Coleman vs. Beach, 97 N. Y. 545:

In this case land was conveyed in fee to enable the grantee to convey in fee simple if she should desire to do so. It also contained a covenant by the grantee that upon sale by her she should cause the proceeds to be properly invested and at her decease the premises or the principal realized from the sale should be conveyed to the issue of the marriage with the grantor's son living at the time of her decease or their legal representatives. The grantee died without having sold the real estate but leaving a will by which she devised the same to her son with power to her executor to sell and convey. It was held that the grantee took only a life estate with remainder in fee to the issue of her marriage and with power in the grantee to sell and convey during her life. The court explains the reasons for its decision in the following words:

“Yet when the whole of the instrument is considered together the apparent repugnance is obviated by the express declaration that the form of the grant was adopted for the purpose, only, of enabling the grantee to sell and convey in fee simple the property described. The same repugnance, and no greater, occurs in all conveyances of property in trust which by the title is vested in trustees but is made subject to the particular object defined in the subsequent clauses of the grant.”

Flagg vs. Eames, 40 Vt. 16:

At page 22, the court quotes with acceptance from 3 Atk. 136, the words of Lord Ch. J. Willes: “That words are not the principal thing of a deed but the intent and design of the grantor (“we have no power indeed to alter the words or to insert words which are not in the deed”) and that the words are to be construed in a manner most agreeable to the meaning of the grantor and that words which are merely insensible are to be rejected. It has always been recognized as a cardinal principle in the interpretation of deeds that the intention of the grantor *when it is plainly and clearly expressed* or can be collected or ascertained from the deed, is to be observed or carried into effect unless it is in conflict with some rule of law and that whatever is repugnant to the general intention of the deed or the obvious particular intention of the grantor is to be rejected if such intention is consistent with the rules of law.”

After stating that “the ante-nuptial settlement, which is the act of both parties, contains a distinct recognition of the fact that the estate conveyed to her

by the deed was only a life estate" (p. 23), the court on the same page further says: "The terms in this deed which indicate the purpose to convey a life estate are a part of the grant." They appear between the words of the grant and the habendum.

The other cases cited by counsel for appellants, chiefly decide that where the grant and the habendum conflict the habendum must be disregarded. In the case before the Court the grant and habendum agree, and convey the same estate, an estate in fee simple, to Peke and Maria. What counsel ask the Court to do is to treat the recitals as part of the grant. They have a different purpose and are only to be resorted to in cases where the grant is not clear.

THE CASES.

Turning now to the decisions, we will cite three cases decided recently by the Supreme Court of Hawaii, all reported in the 20th volume of the Hawaiian Reports.

The leading case is *Simerson vs. Simerson*, 20 Haw. 57. This was not nearly so strong a case as the present case for the defendants, and yet the court held that the subsequent clauses should not control the earlier provisions. In the *Simerson* case the granting part was qualified to some extent by a reservation. Then followed an express prohibition against selling the land or mortgaging it. Then the habendum contained no words indicating a fee simple.

Finally, the subsequent provision relied on to control the earlier provisions expressly stated that after the death of the grantee the land was to descend to her children and to the heirs and assigns of her children forever, thus indicating that there was to be a break in the estate at her death and that her children were to take by way of remainder, and yet the court held that that clause could not control. The opinion was by the late Chief Justice Hartwell, who reviewed the decisions elsewhere somewhat extensively, including the decisions relied on by the other side in that case. Mr. Justice Perry dissented, but only on the ground that the case came within the rule above mentioned in this brief, that where the granting part was uncertain and the subsequent provision certain the former could be explained or controlled by the latter. He did not question the rule that where both parts were certain the first part should control, and much less the rule that where the first part was certain and the last part uncertain, the first part should control.

This decision was followed a little later by the court constituted of the same judges in the case of *Nahaolelua vs. Heen*, 20 Haw. 372, at the bottom of page 377, Mr. Justice Perry agreeing with the other judges on the application of the rule now contended for.

Finally, in *Lucas vs. Lucas*, 20 Haw. 433, at page 441, the same rule was applied by the same court, but with Chief Justice Hartwell succeeded by Chief Justice Robertson.

See also, by way of illustration, *Pritchett vs. Jackson*, 103 Md. 696; *Teague vs. Sowder*, 121 Tenn. 132, 160-169; *Blackwell vs. Blackwell*, 124 N. C. 269; *Hughes vs. Hammond*, 136 Ky. 694 (125 S. W. 144); *Dickson vs. Van Hoose*, 157 Ala. 459 (47 So. 718); also the cases cited in this case in the decision of the Hawaiian Supreme Court (R., pp. 57-61).

As to the right of the grantor to use the word "devise" in a deed as a word of conveyance, the Court is referred to *Morrison vs. Wilson*, 30 Cal. 344.

As to the Federal Court holding itself bound to follow the decision of the State Courts in just such cases as this, see *Dickson vs. Wildman*, 175 Fed. 580, 183 Fed. 398.

It would be difficult to imagine a stronger case than the present for the defendants for the application of the rule that the estate granted in the earlier part of the deed cannot be cut down by later provisions. In most cases of this sort, the courts have held that the granting part controls the habendum. But in the present instance, it is a case of the granting part, the habendum and the introduction together, all clear, controlling certain ambiguous later expressions.

Counsel call attention to the fact that the Adams deed was in Hawaiian and drafted (in 1858) "only a quarter of a century after civilization was introduced into these Islands." Peke conveyed her interest in the property in 1868, and Maria conveyed the property so long ago that by mesne conveyances

it was conveyed to defendant John Buckley and John J. Sullivan in 1894. Therefore, we have the fact that the persons who knew the language in which the deed is written construed it as conveying the property to them. The heirs of Maria, who died twenty-four years ago, could have raised the question at any time during that period, but there is no evidence that they ever did raise the question. Apparently they took the view of all the others that the deed from Adams conveyed a fee simple.

“It is obvious what hesitation an American court ought to feel in attempting to construe a Hawaiian will on the strength of this translation, and still more, in disregarding the opinion of the court on the spot, familiar with Hawaiian habit, and not improbably with Hawaiian speech.”

John Ii Estate, Ltd., vs. Brown, U. S. Supreme Court Reports, 59, Law Ed., 259.

It is true that Mary and Robert could not bring an action for the possession of the land until their mother Peke died in July, 1914, but they had both become of age more than thirty years ago and before the last deed from Peke to Maria and the deed from Maria to Robertson and Bolte and subsequent deeds, and must have known of these important transactions in connection with the family property and must have known of the occupation and improvement of the land by the defendants, and, even aside from the possibility of their bringing a proceeding in the court of land registration to settle the question,

might at least have warned the defendants and thus prevented them from expending further sums in improving the land without first having the title judicially determined.

In other words, if there were any doubt in this case the equities should lead the court to lean toward the construction of the deed which would protect the parties who have been in possession so long and improved the land and the construction which has been accepted on all sides for so many years, and against the construction that would enable the plaintiffs to come in at this late day to raise a question of uncertainty as to the title.

Dated, Honolulu, T. H., October 16, 1916.

Respectfully submitted,

HOLMES & OLSON,

FREAR, PROSSER, ANDERSON & MARX,

E. B. McCLANAHAN,

S. H. DERBY,

Attorneys for Defendants in Error.

No. 2818

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY KALEIALII et al.,

Plaintiffs in Error,

VS.

HENRIETTA SULLIVAN et al.,

Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

S. H. DERBY,

Of Counsel for Defendants in Error.

Filed this.....day of October, 1916.

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

No. 2818

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY KALEIALII et al.,	}
<i>Plaintiffs in Error,</i>	
VS.	
HENRIETTA SULLIVAN et al.,	
<i>Defendants in Error.</i>	}

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

On the trial of the above cause a point was made of the fact that the plaintiff, Mary Kaleialii, and Robert Boyd, the father of the other plaintiffs, were illegitimate, as bearing on the construction of the deed here in question (Tr. 34, 86-87). This point, however, was *expressly* left undecided when the case first went to the Hawaiian Supreme Court on reserved questions of law (Tr. 34), and seems to have thereafter been lost sight of. On the return of the case to the lower court, that court decided that the decision on the reserved questions was decisive of the case and, for that reason, ordered judgment for defendants (Tr. 63). No special findings were

either asked for or made nor are such findings either required or usual in Hawaii.

Waialua Agricultural Co. v. Oahu Ry. & Land Co., 18 Haw. 81, 87;

Yee Chin et al. v. Yuen Kau, 18 Haw. 427.

If the case had been tried in a federal court, it is obvious that the foregoing facts would have prevented any review of the question of whether the decision was supported by the evidence.

Dunsmuir v. Scott, 217 Fed. 200.

The question here may be broader in view of the fact that this court is reviewing a decision of a *territorial* court, but certainly this court has only the same legal powers in the premises that the Supreme Court of Hawaii had when it finally affirmed the judgment of the trial court (Tr. 148). And the rule is absolutely settled in Hawaii that the decision of the trial court in a jury-waived case has the same effect as a verdict of the jury and cannot be reversed if there is *any* evidence, beyond a scintilla, in support of it.

In the Matter of Lewers & Cooke, Ltd., 19 Haw. 334, 335;

Kong Kee v. Kahalekou, 5 Haw. 548;

Laing v. Laing, 10 Haw. 183, 184;

Ah Quai v. Puuki, 11 Haw. 158, 159;

Hoffman v. Bailey, 11 Haw. 669.

Hence, if *any* evidence supports said decision in this case, it *must* be affirmed.

We believe that we have clearly shown in our main brief that the construction given to the deed of Alex-

ander Adams, Jr., to Peke and Maria is correct. Even if it be admitted, however, that Peke only took a life estate under that deed, the claim that Mary Kaleialii and Robert Boyd took the remainder under the word "children" in the deed depends on their being *legitimate children*, for that word does not (except under special circumstances not appearing in this case) include illegitimates, as a mere reference to the encyclopaedias will show.

5 Encyc. Law, 2 ed., 1095, and cases there cited;

7 Cyc. 125, and cases there cited.

In Volume II of Underhill on Wills, Sec. 570, the learned author says:

"In the absence of evidence of a contrary intention it is conclusively settled that only legitimate children are entitled to take under a provision giving property to children *simpliciter*. Whatever the word may be indicating kindred, whether children, issue, descendants, sons, or daughters, it will be generally taken to include only those persons who are legitimate children, issue, etc. It is as though the word 'legitimate' were written in the will before the word 'children', 'sons', 'issue', etc. This rule of construction is based upon the maxim of the civil law, '*Qui ex damnato coitu nascuntur, inter liberos non computentur*'; and although natural children who have acquired the reputation of being the children of the testator, or of the person mentioned in the will, prior to the date of its execution, may, under some circumstances, be capable of taking under the description of children, yet they are not permitted to take upon mere conjecture of intention. There must be either an *express designation of children as illegitimate children*, or there must be such necessary implication of an in-

tention that they shall take that no doubt shall remain that the testator intended them to take as children.”

See also *id.* § 571.

The same rule applies in Hawaii.

Machado v. Kualau, 20 Haw. 722.

In the case at bar we contend that the evidence conclusively shows that Mary Kaleialii and Robert Boyd were illegitimate. Although Peke was married to a man named Stone, the father of Mary and Robert was a man known as Ed. Boyd. Mary Kaleialii expressly admits this in her testimony (Tr. 79, 86, 87, 88) and, while her counsel tried to show that her evidence was based on hearsay, it is very convincing, especially when coming from one of the plaintiffs in regard to her own father. Mary never saw or knew Mr. Stone (Tr. 86-87), and testified that, at the time of Robert's birth, he had been away a long time (Tr. 87-88), and she admitted that both she and Robert were always known as Boyd and not Stone (Tr. 86). She was married as Mary Boyd (*id.*), and the birth records of the Board of Health in regard to Robert, under his native name of Napunako (Tr. 110), show that his father was Edwin Boyd (Tr. 111), who was not Peke's husband (Tr. 86-87). In fact, Robert's children are here suing under the name of *Boyd*. There is some other evidence of illegitimacy (Tr. 126, 128, 131), including numerous admissions by Mary Kaleialii that Ed. Boyd was her father (Tr. 126). *There is no evidence to the contrary.*

It is not necessary, however, to claim that the evidence conclusively shows illegitimacy, but simply that

there is *some* evidence to that effect, as the decision cannot in such case be disturbed. And, such being the case, the plaintiffs in error have no claim under the deed from Alexander Adams, Jr., in any event, because, even if Peke only took a life estate, the property would go at her death to the heirs of said Alexander Adams, Jr. (Tr. 14), and it is settled law in Hawaii that illegitimates cannot inherit from their grandfather and are not his "heirs".

Machado v. Kualau, 20 Haw. 722.

Hence plaintiffs (even if their strained construction of the deed should prevail) have no right to oust those who, in good faith, have dwelt on the property for thirty years and put up substantial improvements, while plaintiffs stood by and failed to disclose their claims. In fact, under the circumstances, the action of the plaintiffs is almost brazen and subversive of the first principles of justice.

Dated, San Francisco,
October 23, 1916.

S. H. DERBY,
Of Counsel for Defendants in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD and ROBERT N. BOYD
and VICTOR K. BOYD, by their Guardian ad
Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and
HENRY HOLMES, Trustees under the Will of
John J. Sullivan, HENRIETTA SULLIVAN,
JOHN BUCKLEY, PRISCILLA ALBERTA
SULLIVAN CLARKE and ROBERT KIRK-
WOOD CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WALTERS
CLARKE, a Minor,

Defendants in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR

In Error to the Supreme Court of the Territory of
Hawaii.

ANDREWS & PITTMAN and FRANK ANDRADE,
Attorneys for Plaintiffs in Error.

Filed

DEC 26 1916

F. D. Monckton,

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD and ROBERT N. BOYD,
and VICTOR K. BOYD, by their Guardian ad
Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and
HENRY HOLMES, Trustees under the Will of
John J. Sullivan, HENRIETTA SULLIVAN,
JOHN BUCKLEY, PRISCILLA ALBERTA
SULLIVAN CLARKE and ROBERT KIRK-
WOOD CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WALTERS
CLARKE, a Minor,

Defendants in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR

As the construction of the deed has been thoroughly discussed, we will refrain from unnecessarily burdening the court by repetition and confine our reply to the points raised in the supplemental brief of S. H. Derby, of counsel for Defendants in Error, illegitimacy and laches.

On the question of laches, we desire to call the court's attention to the fact that this is a statutory

action and that the same was instituted within less than three months after plaintiffs' right of action accrued, hence, neither the statute of limitations nor laches could possibly be pleaded.

The mere fact that Mary and Robert became of age more than thirty years ago and before the last deed from Peke to Maria and must have known of the transaction, could not possibly affect the right of the plaintiffs to bring this action. What Robert and Mary might or should have known could not affect plaintiffs' right of action, as it is elementary that remainder-men cannot assert their rights until after the termination of the particular estate upon which the remainder is created. The improvements made on the property by the defendants prior to the death of Peke would not bar plaintiffs' right of action, as any protest on behalf of plaintiffs or assertion of their rights prior to the death of Peke, when plaintiffs' right of action accrued, would have been futile. No testimony could have been introduced at the trial of this cause showing that plaintiffs had asserted their rights prior to the death of Peke and protested against any improvements made by the defendants on the property involved, as such testimony would have been immaterial and irrelevant.

Plaintiffs are criticized for failing to disclose their claims to the defendants who in good faith had dwelt on the property for thirty years and put up substan-

tial improvements. Plaintiffs had no right to assert their claims or make any protests, as they had only a contingent interest in the property which would accrue upon the death of Peke. The defendants, who were in possession of the property, had full knowledge of the contents of the Adams deed and should have governed themselves accordingly. They must have known at the time they made the improvements that they only held the life estate of Peke and that, upon the death of Peke, the property would go to the plaintiffs. If they did not know it, it was not the fault of the plaintiffs, as defendants could have obtained legal advice.

Mr. Derby has devoted the main portion of his supplemental brief to a discussion of the law governing the right of illegitimate children to inherit from their father, entirely overlooking the fact that there is no evidence showing, or even tending to show, that Mary Kaleialii and Robert Boyd were illegitimate children and not the legitimate children of Peke and Mr. Stone, their mother's husband. It is true that Mary Kaleialii testified that she did not know who her father was and that, at the time of the birth of Robert, Mr. Stone was away. (T. R. 86.) She did not, however, testify as to where Mr. Stone, her father, had gone. There is absolutely no evidence in the record showing the non-access of the husband, Mr. Stone.

The mere fact that a child did not know who his father was, would not establish illegitimacy. Illegitimacy must be proven by strong, convincing and almost impeccable evidence. A child is presumed to be legitimate until that presumption is overcome beyond a reasonable doubt.

Jones in discussing the presumption of legitimacy, said:

“There is no presumption of the law more firmly established and founded on sounder morality and more convincing reason than the presumption that children born in wedlock are legitimate. In his work on Evidence, Stephen thus states the modern English rule as to the presumption in favor of legitimacy: ‘The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother’s husband could have been his father, is conclusive proof that he is the legitimate child of his mother’s husband, unless it can be shown, either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.’”

Jones Commentaries on Evidence, Vol. 1, pp. 448-449.

“A child born during wedlock is presumed to be legitimate, though the husband and wife have been mar-

ried but fifteen days and she had been divorced from her former husband but twenty days, such divorce being based upon service of process by publication, and there being no evidence showing whether or not such husband was a resident of the state or lived with his wife at or within the period of conception. Whenever the child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such intercourse did not take place at any time when by such intercourse the husband could be the father of the child. To bastardize a child born in lawful wedlock, the most *clear and conclusive evidence* of nonaccess is required."

Jones Commentaries on Evidence, Vol. 1, pp. 450-451.

"In England, unless the husband was shown to be beyond seas during all the period in which it was possible for the wife to become pregnant and be delivered of a child, or unless it could be shown beyond question that the husband had no power of procreation, this presumption was so absolute that the doctrine of *filiatio non potest probari* applied, and no proofs would be received to dispute the legitimacy of the child. This doctrine has practically been adopted in the United States with the modification that if the child is born under such circumstances that render it impossible that the husband of its mother can be its father, then the child may be adjudged a bastard. So that before such child can be adjudged a bastard, the proof must be clear, certain and conclusive, either that the husband had no powers of procreation, or the circumstances were such

as to render it impossible that he could be the father of the child."

Jones Commentaries on Evidence, Vol. 1, pp. 452-453.

"The presumption arises, *though the parties live apart* by mutual consent, though not when they are separated by the *divorce* of the court. They are then presumed to obey the judgment of the court."

Jones Commentaries on Evidence, Vol. 1, p. 455.

We also most respectfully call the court's attention to the fact that Mary Kaleialii is a Hawaiian, unfamiliar with the English language and a stranger to court proceedings. The fact that in one breath she said Boyd was her father and, in the next, said she did not know who her father was, clearly shows that she was confused and did not know what she was testifying to, her confusion evidently being due to her lack of knowledge of the English language and court proceedings.

If the statements of Mary Kaleialii are sufficient to bastardize her and her brother, then the well-established rule of law that a child is presumed to be legitimate until proven illegitimate by strong and irrefutable evidence will have to be ignored and the burden shifted to the shoulders of the child who has been attacked on the grounds of illegitimacy.

The court should not overlook the fact that Alexander Adams, Jr., deeded the property to Peke and

Maria, his daughters, and that the interests of the plaintiffs was acquired not by inheritance, but through purchase.

Section 3248 of the Revised Laws of Hawaii, 1915, reads as follows:

“Every illegitimate child shall be considered as an heir to his mother and shall inherit her estate in whole or in part, as the case may be, in like manner as if he had been born in lawful wedlock.”

Revised Laws of Hawaii, 1915, Sec. 3248.

There is absolutely no merit to the points raised in Defendants in Error’s supplemental brief—laches and illegitimacy. The only question before the court, in our humble opinion, is the construction of the deed. Was the deed absolute, or did it simply create a life estate in Peke and Maria with remainder over to their children?

In view of the evidence adduced at the trial and the wording of the deed, we must respectfully submit that the Plaintiffs in Error should prevail.

Respectfully submitted,

ANDREWS & PITTMAN,

FRANK ANDRADE,

Attorneys for Plaintiffs in Error.

Dated, Honolulu, T. H.,

December 13, A. D. 1916.

No. 2818

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY KALEIALII et al.,

Plaintiffs in Error,

VS.

HENRIETTA SULLIVAN et al.,

Defendants in Error.

ANSWER OF DEFENDANTS IN ERROR TO REPLY BRIEF OF PLAINTIFFS IN ERROR.

S. H. DERBY,

Of Counsel for Defendants in Error.

Filed this.....day of January, 1917.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

No. 2818

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY KALEIALII et al.,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN et al.,
Defendants in Error.

ANSWER OF DEFENDANTS IN ERROR TO REPLY BRIEF OF PLAINTIFFS IN ERROR.

On oral argument counsel for plaintiffs in error expressly stated that there was no question at all as to Robert Boyd's illegitimacy, and that, as to Mary Kaleialii, there was merely some doubt. He claimed, however, that as § 3248 of the Revised Laws of Hawaii permitted an illegitimate to inherit from its mother the plaintiffs must still prevail. He has since apparently discovered that the law aforesaid has no application to this case and, therefore, he *now* takes the surprising position that there is no evidence even tending to show illegitimacy. We trust that the court will sufficiently remember the oral argument to

appreciate this change of front, and we shall now deal briefly with the new issue advanced.

No cases are cited in the reply brief, but counsel offers for consideration some carefully selected passages from a text writer, which cannot be intelligently read apart from their context. It should also be remembered that the same author *later* states (on p. 458) that, if no sexual intercourse between the husband and wife is shown, a large variety of circumstances may be considered to rebut the presumption of legitimacy. As far as Hawaii is concerned, however, the whole matter is settled by the case of *Godfrey v. Rowland*, 16 Haw. 377, 386-387, where the court says:

“Defendants’ instruction numbered fifteen is correct. It is not necessary for the defendant to go so far as to show that there was no possibility of access between Frank and Alice at or near the time of the child’s conception in order to make competent proof of the child’s illegitimacy.

It was once held that the presumption of legitimacy, if the husband by possibility could have had access to the wife, could not be disproved; the early rule being that if the husband was ‘within the four seas’ the child was legitimate and the contrary could not be shown. Later, it was held that if the fact of marriage has been proved, nothing can impugn the legitimacy of the issue short of proof of facts showing it to be impossible that the husband could be the father. *Patterson v. Gaines*, 6 How. 550. The point actually decided in *Patterson v. Gaines*, however, was that a child could not be bastardized by the mere declarations of the father. In *Phillips v. Allen*, 2 Allen 453, it was held that the presumption of legitimacy can only be rebutted by evidence which proves beyond all reasonable doubt that the husband could not

have been the father. These cases show a survival of a trace of the old *quatuor maria* idea. We understand the modern rule to be that proof of non-access need not go to the extent of showing the impossibility of the husband being the father; neither is it necessary that the proof should be clear beyond every reasonable doubt. If it is once held that the presumption may be rebutted at all, there seems to be no logical reason why the fact of illegitimacy should be required to be proved in any other manner than is any other fact in a court of justice. This seems to have been the view of the House of Lords in *Morris v. Davies*. On page 244, Lord Cottenham said, 'the argument for the appellant assumes as a rule of law, that no evidence is admissible to disprove sexual intercourse having taken place, where the opportunity is proved to have existed, the husband and wife being proved to have been within the same house. This is very like attempting to establish a doctrine of *intra quatuor muros*, instead of the exploded doctrine of *quatuor maria*. But it is admitted that the parties may be followed within these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact. If so the principle does not stand on any positive rule of law, *but upon evidence of the fact as to which the ordinary rules of evidence must be applied.*' And again on page 260 it is said the presumption stands until encountered by such evidence as proved *to the satisfaction of those who are to decide the question* that sexual intercourse did not take place. And on page 261 'that it is the duty of a jury and your Lordships to weigh the evidence against the presumption and to decide according as, in the exercise of free and honest judgment, either may appear to preponderate'." (Italics those of the court.)

In the case at bar Mary Kaleialii, who always lived with her mother till her marriage (Tr. pp. 83-85) and

who was much older than her brother Robert (Tr. 87, 88), testified that she never knew Mr. Stone and had only heard about him, and it is somewhat surprising to have it suggested that this is not some evidence of non-access and that he was not Robert's father. And, as far as she herself is concerned, we have her repeated *admissions* on the subject as well as numerous other facts referred to on page 4 of our supplemental brief.

We submit that on the evidence in this case no judge or jury could reasonably reach any conclusion other than that Mary and Robert were both illegitimate. As previously pointed out in our supplemental brief, however, the question is not whether such is a *necessary* conclusion, but whether there is *any* evidence to support the same, as in such case the judgment cannot be disturbed. The explanation that Mary Kaleialii became confused in giving her evidence is hardly a satisfactory reply to this contention.

On the last page of the reply brief counsel calls attention to the fact that the interests of the plaintiffs were acquired by *purchase* and not by *inheritance*, and then cites a statute permitting illegitimates to *inherit* from their mother—a strange confusion of reasoning. If the deed from Alexander Adams, Jr., gave a remainder to Peke's "children" (as we believe it clearly did not), that term would only apply to *legitimate* children and their right of inheritance from Peke would be immaterial, for, if she took only a life estate, there was nothing to inherit. On plaintiffs' construction, if there were no children, i. e., no legiti-

mate children, the property was to revert to Alexander Adams, Jr., and his heirs, and plaintiffs cannot claim through him because they are not his heirs (*Machado v. Kualau*, 20 Haw. 722).

We, therefore, again submit that, even if plaintiffs' construction of the deed should prevail, they still have no claim to the property and the judgment should be affirmed.

Dated, San Francisco,
January 2, 1917.

Respectfully submitted,

S. H. DERBY,

Of Counsel for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

7

J. P. ROSE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Fourth Division.

Filed

AUG 30 1916

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. P. ROSE,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Fourth Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of J. P. Rose.....	15
Arraignment	4
Assignment of Errors	141
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions.....	34
Certificate of Clerk, U. S. District Court, to Transcript of Record.....	148
Certificate to Bill of Exceptions and Order....	139
Citation on Writ of Error.....	146
Demurrer	6
Indictment	2
Instructions to the Jury.....	125
Judgment	30
Minutes of Court—March 31, 1916.....	9
Minutes of Trial—April 1, 1916.....	11
Minutes of Trial—April 3, 1916.....	21
Minutes of Trial—April 4, 1916.....	24
Minutes of Court—April 8, 1916.....	28
Minutes of Court—April 11, 1916.....	28
Minutes of Court—April 12, 1916.....	29
Minutes of Court—April 12, 1916.....	29
Minutes of Court—April 12, 1916.....	30
Minutes of Court—April 12, 1916.....	33
Motion for a New Trial.....	136

Index.	Page
Motion for Appointment of Elisor.....	14
Motion for Order Allowing Supersedeas and Fixing Amount of Bond.....	140
Names and Addresses of Attorneys of Record..	1
Notice of Hearing of Settlement of Bill of Ex- ceptions	138
Order Allowing Defendant's Proposed Bill of Exceptions	139
Order Continuing Hearing on Demurrer.....	7
Order Denying Motion for Admission of De- fendant to Bail.....	5
Order Denying Motion for New Trial.....	29
Order Denying Motion for Supersedeas and Fixing Amount of Bond.....	141
Order Directing Filing of Bill of Exceptions...	140
Order Enlarging Return Day.....	147
Order Fixing Time to Prepare Bill of Excep- tions	33
Order Fixing Time for Pronouncing Sentence..	30
Order for Bench Warrant.....	4
Order Overruling Demurrer.....	7
Order Resetting Motion for New Trial.....	28
Order Setting Motion for New Trial.....	28
Order Setting Time to Plead.....	5
Order to Supply Jurymen and Bailiffs With Meals and Lodgings	10
Plea of Not Guilty and Order Setting for Trial.	8
Praecipe for Transcript on Writ of Error.....	1
Stipulation Re Filing of Indictment.....	99
Stipulation Under Rule 23.....	150

Index.

Page

TESTIMONY ON BEHALF OF PLAINTIFF:

BUCKLEY, JOHN J.	69
CAREY, GRACE	34
Cross-examination	40
Redirect Examination	68
Recross-examination	69
CAREY, MARION	73
FAIRBORN, JAMES	72
HALL, FRANK B. (In Rebuttal)	115
HERRINGTON, LAURA	71
Cross-examination	71
MILLER, J. H. (In Rebuttal)	117
Cross-examination	120

TESTIMONY ON BEHALF OF DEFENDANT:

ANDERSON, ANDREW	101
Cross-examination	103
BISHOPRICK, F.	109
Cross-examination	110
KIEL, THOMAS	110
Cross-examination	112
McPHEE, WILLIAM	106
Cross-examination	107
Redirect Examination	108
PATTON, J. J.	100
ROSE, J. P.	74
Cross-examination	85
Redirect Examination	93
Recross-examination	98

Verdict	27
---------------	----

Writ of Error	145
---------------------	-----

Names and Addresses of Attorneys of Record.

R. F. ROTH, U. S. Attorney, Fairbanks, Alaska,

H. E. PRATT, Asst. U. S. Attorney, Fairbanks,
Alaska,

Attorneys for Plaintiff and Defendant in Error.

LOUIS K. PRATT, Fairbanks, Alaska,

LERoy TOZIER, Fairbanks, Alaska,

Attorneys for Defendant and Plaintiff in Error.

[1*]

[Title of Court and Cause.]

Praecipe for Transcript on Writ of Error.

To J. E. Clark, Clerk of said Court:

You will please prepare and certify to a transcript of the record in the above-entitled action, for the use of the United States Circuit Court of Appeals for the Ninth Circuit in connection with the writ of error heretofore sued out by the defendant, and when such transcript is completed, forward the same to F. D. Monckton, Clerk of the said Court of Appeals, at San Francisco, California.

The said transcript should contain the following papers and records, to wit:

1st. The indictment with all endorsements thereon.

2d. The defendant's demurrer to the indictment with endorsements.

3d. The Bill of Exceptions complete with endorsements.

4th. All minute and other journal entries, includ-

*Page-number appearing at foot of page of original certified Record.

ing the final sentence and judgment, that were made and entered of record by the clerk, during the pendency of the case.

5th. The Writ of Error and order extending time to file transcript in the Court of Appeals and Citation are original papers and must be forwarded to Mr. Monckton at San Francisco, California, along with the transcript.

LOUIS K. PRATT,
Attorney for Defendant.

Service of the above and foregoing praecipe for transcript on Writ of Error admitted by receipt of copy, this May 19th, 1916.

R. F. ROTH,
By H. E. PRATT,
United States District Attorney. [2]

*In the District Court for the Territory of Alaska,
Fourth Judicial Division.*

NO. 722—CR.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. P. ROSE,

Defendant.

Indictment.

J. P. Rose is accused by the Grand Jury of the Territory of Alaska, Fourth Judicial Division, convened at Fairbanks for the regular February, 1916, term of the District Court by this indictment of the crime of rape, committed as follows, to wit:

That the said J. P. Rose on the first day of June, one thousand nine hundred and thirteen, at Fairbanks in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this Court, did then and there, wilfully, unlawfully and feloniously carnally know and abuse one Grace Carey, a female child, then under the age of sixteen years, to wit, of the age of twelve years, he, the said J. P. Rose, then and there being a male person over the age of twenty-one years; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Fairbanks, in the Division and Territory aforesaid this 1st day of March, 1916.

R. F. ROTH,
United States Attorney.

A true bill.

J. P. NORRIS,
Foreman.

The following are the names of the witnesses examined before the Grand Jury on the finding of the foregoing indictment:

GRACE CAREY,
LAURA HERINGTON.

[Endorsed]: No. 722 Cr. In the District Court, Ter. of Alaska, 4th Judicial Division. United States of America vs. J. P. Rose. Indictment Crime of Rape. A True Bill. J. P. Norris, Foreman Grand Jury. Secret. Without Bail, Charles E. Bunnell, District Judge. Presented to the Court by the foreman of the Grand Jury in open Court in the presence

of the Grand Jury and filed in the District Court, Territory of Alaska, Fourth Division. Fairbanks, Alaska. Mar. 2, 1916. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [3]

[Title of Court and Cause.]

Order for Bench Warrant.

The United States Grand Jury having on this 2d day of March, 1916, returned an indictment against the defendant named therein for the crime charged in said indictment, now, on application of the United States Attorney made in open court,

It is ordered that the clerk of this court may issue a bench warrant directed to the United States Marshal for the defendant named in said indictment, said defendant not to be admitted to bail.

CHARLES E. BUNNELL,

District Judge. [4]

[Title of Court and Cause.]

Arraignment.

Now, at this time, R. F. Roth, United States Attorney, Harry E. Pratt, Assistant United States Attorney and Reed W. Heilig, Assistant United States Attorney, appearing in behalf of the Government, and defendant appearing in person in custody of the United States Marshal, with his attorney, Louis K. Pratt, and said defendant, being brought to the bar of the Court, and being asked if he is indicted by his true name and answering that he is, the said indictment was read to the defendant and a true

copy thereof including a list of the witnesses appearing before the Grand Jury for the purpose of this indictment, duly delivered to him.

CHARLES E. BUNNELL,
District Judge. [5]

[Title of Court and Cause.]

Order Denying Motion for Admission of Defendant to Bail.

Now, at this time, Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys, appearing in behalf of the Government and defendant appearing in person, in the custody of the United States Marshal and with his attorney, Louis K. Pratt, Esq., counsel for defendant herein now moves the Court that said defendant be admitted to bail, and argument having been had by respective counsel and the Court having considered said motion,

It is ordered that said motion be, and the same is, hereby denied.

(Clerk's note: Defendant notes an exception to above ruling, which exception is allowed.)

CHARLES E. BUNNELL,
District Judge. [6]

[Title of Court and Cause.]

Order Setting Time to Plead.

Now, at this time, Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys, appearing in behalf of plaintiff and defendant appearing in person and in the custody of the United States

Marshal and being represented by Louis K. Pratt, Esq.,

It is ordered that the time for defendant to enter his plea or otherwise move against the indictment herein be, and the same is hereby fixed at 2 o'clock P. M., Wednesday, March 29th, 1916.

CHARLES E. BUNNELL,
District Judge. [7]

[Title of Court and Cause.]

Demurrer.

The defendant demurs to the indictment herein, for the reasons:

I.

That the said indictment does not substantially conform to the requirements of Chapter 7 of Title 15 of the Code of Criminal Procedure, in this that the same does not contain a statement of facts constituting the supposed offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended thereby, nor is it direct and certain as to what particular crime is intended to be charged, nor is the crime of statutory rape as defined by Section 1894 of the Criminal Code covered by the language used in said indictment, either in the language of the section last mentioned or by other words of similar meaning.

II.

Because the facts stated in the said indictment do not constitute a crime.

LOUIS K. PRATT,
Attorney for Defendant.

[Endorsed]: Filed Mar. 29, 1916. [8]

[Title of Court and Cause.]

Order Continuing Hearing on Demurrer.

Now, at this time, R. F. Roth, United States Attorney and Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys appearing in behalf of the Government, and defendant appearing in the custody of the United States Marshal and with his attorney, Louis K. Pratt, now, upon motion of counsel for defendant, and there being no objection.

It is ordered that the hearing on demurrer to indictment herein be, and the same is, hereby continued to 2 o'clock P. M., to-day, Thursday, March 30th, 1916.

CHARLES E. BUNNELL,
District Judge. [9]

[Title of Court and Cause.]

Order Overruling Demurrer.

Now, at this time, R. F. Roth, United States Attorney, and Harry E. Pratt, Assistant United States Attorney, appearing in behalf of the Government and defendant appearing in the custody of the United States Marshal with his attorney, Louis K.

Pratt, and defendant's demurrer to the indictment herein came on to be heard before the Court and argument was had by respective counsel herein.

Court declared recess until 3:30 o'clock P. M.

Thereafter, at 3:30 o'clock P. M., respective counsel and defendant in the custody of the United States Marshal, all being present, said hearing was continued and after argument by respective counsel, said demurrer was overruled by the Court.

(Clerk's note: Defendant excepts to above ruling, which exception is allowed.)

CHARLES E. BUNNELL,
District Judge. [10]

[Title of Court and Cause.]

Plea of Not Guilty and Order Setting for Trial.

Now, at this time, came R. F. Roth, United States Attorney and Harry E. Pratt, Assistant United States Attorney in behalf of the Government; came also the defendant in the custody of the United States Marshal, with his attorney, Louis K. Pratt, and defendant having, on a prior day of this term, been duly arraigned, was asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, namely, that of rape, to which defendant says that he is not guilty, and therefore puts himself upon the country and the United States Attorney for and in behalf of the Government, doth the same, and this cause is hereby set down for trial at 2 o'clock P. M., Friday, March 31st, 1916.

CHARLES E. BUNNELL,
District Judge [11]

[Title of Court and Cause.]

Minutes of Court—Mar. 31, 1916.

Now, at this time, this cause came on regularly for trial by jury, the defendant appearing in person in the custody of the United States Marshal and being represented by his attorney, Louis K. Pratt, Esq., and the Government being represented by R. F. Roth, United States Attorney and Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys; both parties announcing their readiness for trial, the following proceedings were had, to wit:

On the Court's own motion, the Court ordered that all persons of the general public not properly having business before the Court, be excluded from the courtroom during the trial of this cause, to which ruling, defendant notes an exception, which exception was allowed.

The members of the regular panel of petit jurors all being present and each being called and answering to his name, the clerk proceeded to draw from the trial jury-box, one at a time, the names of said members of the regular panel of petit jurors, and after said jurors were duly sworn as to their qualifications, the respective counsel proceeded to duly examine said jurors and exercise their challenges according to law.

And it appearing to the Court that the jury thus far drawn should be kept together in charge of sworn bailiffs, S. T. Kincaid and R. K. Latimer were duly sworn as bailiffs in charge of said jury whereupon, said jury were excused in charge of their sworn bail-

iffs during argument before the Court. Members of the regular [12] panel of petit jurors not yet drawn, were excused until 4 o'clock P. M.

Court declared recess until 4 o'clock P. M.

4:00 P. M.

Thereafter, at 4 o'clock P. M., the defendant in charge of the United States Marshal, and the respective counsel being present as heretofore, said trial was resumed and the following proceedings had, to wit:

Argument was continued by respective counsel herein.

At 4:40 o'clock P. M., the jury in charge of their sworn bailiffs returned into Court; also the members of the regular panel not yet drawn, and it was stipulated by respective counsel that all were present.

Respective counsel continued to examine the members of the regular panel of petit jurors and to exercise their challenges according to law.

Thereupon, the jurors in the box, having been duly admonished, were excused in charge of their sworn bailiffs until 10 o'clock A. M., Saturday, April 1st, 1916. Members of the regular panel of petit jurors not yet drawn were excused until 10 o'clock A. M., Saturday, April 1st, 1916.

CHARLES E. BUNNELL,
District Judge. [13]

[Title of Court and Cause.]

**Order to Supply Jurymen and Bailiffs With Meals
and Lodgings.**

Now, on this day, to wit, March 31st, 1916, it

appearing to the Court that it is necessary that the jury, now in process of formation or having under consideration the law and the evidence as given to them on the trial of the above-mentioned cause should be kept together and free from communication or association with other persons, and in constant charge of two officers of the Court, duly sworn;

IT IS NOW THEREFORE ORDERED that the said jury be assigned to the custody of two duly sworn bailiffs, and that the U. S. Marshal for this Division and Territory provide the said jury and bailiffs with meals and lodgings at the expense of the United States, until such time as the jurymen have agreed upon their verdict or have been discharged by the Court.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13 Page 485.

[Endorsed]: Filed Mar. 31, 1916. [14]

[Title of Court and Cause.]

Minutes of Trial—Apr. 1, 1916.

Now, at this time, came R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney in behalf of the government; came also the defendant in the custody of the United States Marshal and with his attorney, Louis K. Pratt, Esq;—came also the jurors in the box, in charge of their sworn bailiffs and the remaining members of the regular panel of petit jurors, whereupon the following proceedings were had, to wit:

Respective counsel continued to examine the members of the regular panel of petit jurors and to exercise their challenges according to law.

Whereupon, the members of the regular panel in the box were excused in charge of their sworn bailiffs after having been duly admonished by the Court, until 2 o'clock P. M. The remaining members of the regular panel of petit jurors were excused until 2 o'clock P. M.

Court declared recess until 2 o'clock P. M.
2:00 P. M.

Thereafter, at 2 o'clock P. M. came the defendant in the custody of the United States Marshal, with his attorney, Louis K. Pratt; came also R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney in behalf of the Government; came also the jurors in the box in charge of their sworn bailiffs and the remaining members of the regular panel of petit jurors except those previously excused for cause in this case, and being called [15] and each answering to his name as present, said trial was resumed and the following proceedings had, to wit:

Respective counsel continued to examine said jurors and to exercise their challenges according to law.

And it appearing to the Court that the regular panel of petit jurors is exhausted and that the jury is incomplete, it is hereby ordered that the clerk of this court issue a writ of special venire directed to the United States Marshal of this Division and Territory commanding him to summons from the

body of the District ten (10) men qualified to sit as jurors in this court said special venire returnable at 7:30 o'clock this day.

Hereupon, the members of the jury thus far qualified having been duly admonished by the Court were excused in charge of their sworn bailiffs, during argument by counsel for defendant for the appointment of a special officer to serve said special venire and after hearing the argument of respective counsel and the court having considered said motion, it is hereby denied, to which ruling defendant notes an exception, which exception is allowed.

And now, the jury having returned into Court in charge of their sworn bailiffs after having been duly admonished by the Court, were excused in charge of their sworn bailiffs until 7:30 o'clock P. M.

Court declared recess until 7:30 o'clock P. M.

7:30 P. M.

Thereafter, at 7:30 o'clock P. M. came the defendant in the custody of the United States Marshal with his attorney, Louis K. Pratt, Esq: came also R. F. Roth, United States Attorney and Harry E. Pratt, Assistant United States Attorney in behalf of the Government; came also the jurors in the box, in charge of their sworn bailiffs, and the remaining members of the regular panel of petit jurors except those previously excused for cause and being called, [16] each answered to his name as present, whereupon said trial was resumed and the following proceedings had, to wit:

The Marshal returned into Court the special venire heretofore issued and the members thereof, to wit: C. L. Carlson; E. C. Heacock; W. S. Reese; J. H. Sanford; H. D. Marsh; Allen A. Johnson; Murray Smith; P. A. Hennings; Oscar Sampson and J. H. Groves upon being called, each answered to his name as present; whereupon the clerk proceeded to draw from the trial jury-box, one at a time, the names of the members of said special venire and the *repsceive* attorneys exercised their challenges and examined the jurors so drawn until each side was satisfied with the jury and the jury was complete and consisted of the following persons, to wit:

Robert Moore,	L. Enstrom,
R. J. Patterson,	S. R. Bredlie,
F. G. Holmberg,	E. J. Stier,
T. T. Swan,	Geo. Knapp,
C. L. Carlson,	W. S. Reese,
P. A. Hennings,	E. C. Heacock,

which said jury was duly sworn to try the issues in said cause;

Hereupon, said jury was duly admonished by the Court and excused in charge of sworn bailiffs to report at 10 o'clock A. M. Monday, April 3d, 1916.

CHARLES E. BUNNELL,

District Judge. [17]

[Title of Court and Cause.]

Motion for Appointment of Elisor.

The defendant moves the Court for an order appointing an Elisor to serve the venire for tales-

men to complete the jury in this case, for the reason that L. T. Erwin, Marshal of said Division and all of his deputies present at Fairbanks, other than Mae Peterson, stenographer, and M. O. Carlson, office deputy, by reason of their bias and prejudice against him, are disqualified from executing the said venire, by selecting and serving the same upon the said talesmen.

This motion will be supported by the affidavit of J. P. Rose and the records and files in the Wooldridge, Jones and Callahan cases now pending or lately tried in this Court, and the records and files in the case of the United States of America vs. J. P. Rose in the Commissioner's Court at Fairbanks.

LOUIS K. PRATT,
Attorney for Defendant.

Service of the foregoing motion, by copy thereof, admitted this 1st day of April, 1916.

R. F. ROTH,
United States Attorney.

[Endorsed]: Filed Apr. 1, 1916. [18]

[Title of Court and Cause.]

Affidavit of J. P. Rose.

United States of America,
Territory of Alaska,—ss.

J. P. Rose, being first duly sworn, upon his oath deposes and says: That he is the defendant in the above-entitled action;

That heretofore and on the evening of February

15, 1916, while this defendant was lying upon his bed reading, in his room in the rear of his shop on Lacey Street, in the town of Fairbanks, J. H. Miller, George Berg and John C. Wood, then and now deputy marshals under the said L. T. Erwin, Marshal of the said division, surreptitiously placed themselves in a hallway next to the said bedroom, and one of them, to wit, the said George Berg, made an opening with his knife so that he could or claimed that he could, see through the partition into the said bedroom where this defendant was lying on his bed, and after making such preparations, all three of said deputies, and especially the said George Berg, watched this defendant for about fifteen minutes, according to the testimony of the latter; that during said time W. H. Wooldridge came into defendant's shop and passed through to the bedroom where defendant was and engaged in conversation with him; that shortly thereafter Laura Herington, a half-breed Indian girl, came through the said shop and to the entrance of said sleeping-room; that while this was taking place in the shop, F. B. Hall and P. McMullen, also then and now deputy marshals under the said L. T. Erwin, were watching the front of said shop; that a few minutes after the girl came into said shop, some of the deputies came in and spoke to the said defendant about the said occurrence, and others of said deputies [19] intercepted the said W. H. Wooldridge after he had left and had started for his home, and requested both to go to the Marshal's office, which request was complied with; that after arriving at the said office, and

when all of the deputies above named were present in a room, defendant was requested by said deputy marshal, J. H. Miller, who was then and there the Chief Deputy, to make a statement concerning the transactions at his shop on that evening, which he thereupon did, which said statement was taken down in writing by the said J. H. Miller and signed by this defendant; that at the time of signing said statement, defendant did not have his glasses with him and was unable to read it, and the same was read over to him by some one of the deputies, but either was not read correctly or defendant did not understand it correctly; that the said writing contained several erroneous statements and made this defendant say things that he did not say and which were not true, and that the said statements reflected upon the said W. H. Wooldridge and tended to incriminate him with reference to the said Laura Herington, and especially so in one particular where the said written statement makes this defendant say "that the said Wooldridge had told defendant, or gave him to understand, in his room on the evening in question, that he, Wooldridge, wanted to or intended to have sexual intercourse with the said Laura Herington"; that afterwards the said W. H. Wooldridge was indicted for the crime of statutory rape at a cabin in Fairbanks, and attempt to commit statutory rape upon the said Laura Herington at defendant's shop on the said evening; that a trial upon the said indictment took place in this Court commencing on the 6th day of March, 1916, during which defendant was a witness on behalf of the Gov-

ernment and gave testimony favorable to defendant and denied at that time, under oath, that the said Wooldridge had told him or given him to understand, in his bedroom or shop on the evening in question, "that he, Wooldridge, wanted to or expected to have sexual intercourse with the said Laura Herington"; [20] that at said trial all of the said deputies, except John C. Wood and P. McMullen, were witnesses on behalf of the Government; that the said deputy George Berg, in his testimony, disputed the evidence of defendant with reference to the conversation between the said Wooldridge and himself on the said occasion, and testified that from his position in the said hall, by looking through the slit or hole in the partition, he could see this defendant and the said Wooldridge, could hear a part at least of their conversation, and that said Wooldridge had at that time told this defendant in substance that he expected or wanted to have sexual intercourse with the said Laura Herington; that prior to the delivery of the said testimony by him in the trial of the said W. H. Wooldridge, this defendant was indicted by the Grand Jury of the crime of statutory rape, as shown by the indictments herein; that after he had given said evidence in the Wooldridge case, the said Marshal and his said deputies were much incensed against him, by reason thereof, and thereafter a complaint was sworn to by R. F. Roth, United States Attorney, and filed in the office of the Commissioner at Fairbanks, charging him with the crime of perjury, the same being based upon his evidence in regard to what Wooldridge had said to

him in *in* his room on the evening of February 15, 1916; that at his preliminary examination before J. K. Brown, Commissioner, at Fairbanks, held on the 28th day of March, 1916, the said George Berg was the principal witness for the Government and again related what he claimed to have seen and heard on the evening of February 15, 1916; that as the result of such testimony and other evidence, this defendant was bound over to the grand jury by the said Commissioner to answer to the charge of perjury, his bond being fixed at two thousand dollars (\$2,000.00).

That at about the time the said W. H. Wooldridge was indicted by the grand jury, indictments were returned against Robert [21] Jones and Daniel Callahan, charging each of them with the crime of statutory rape, in the case of Jones as against the girl, Laura Herington, and in Callahan's case as against one Grace Carey; that after the termination of the Wooldridge trial, said Jones was tried by a jury and later said Callahan was tried; that in selecting the special venire at the trial of the said Robert Jones, wherein four talesmen were ordered, the said Marshal, through his deputies, selected four, two of whom were Wallace Cathcart and T. A. Parsons. That in the Callahan trial a venire for eight talesmen was ordered, who were selected by the said Marshal and his deputies, and the said Wallace Cathcart and T. A. Parsons were again served as talesmen, and one of them, viz., Wallace Cathcart, was chosen as a juryman and sat at the trial of the said Callahan and voted for conviction throughout

the deliberations of the said jury, such deliberations finally resulting in a verdict of guilty.

That it is common talk in the town of Fairbanks, and generally believed, and this defendant believes, that the said Marshal and his said deputies, in selecting the two lists of talesmen in the said cases of Jones and Callahan, endeavored at least to select men inclined to find a verdict of guilty; that defendant avers and believes that if said Marshal and his deputies, other than the said stenographer and office deputy, are allowed to serve the special venire herein, they will discriminate against him and so far as lay in their power, will select talesmen likely to be prejudiced against him, and ready and willing to agree upon a verdict of guilty upon any sort of a showing made by the Government, whether the same is sufficient to establish his guilt beyond a reasonable doubt or not.

That with reference to deputy marshal M. O. Carlson, defendant has no criticisms to make other than that, under the circumstances, he could not and would not be a fair and impartial officer to select talesmen, for the reason that his position under the Marshal would prevent him from acting on his own judgment and in an independent [22] manner.

J. P. ROSE.

Subscribed and sworn to before me this 1st day of April, 1916.

J. E. CLARK,
Clerk.

By Sidney Stewart,
Deputy.

Service of the foregoing affidavit, by copy thereof, admitted this 1st day of April, 1916.

R. F. ROTH,
United States Attorney.

[Endorsed]: Filed Apr. 1, 1916. [23]

[Title of Court and Cause.]

Minutes of Trial—Apr. 3, 1916.

Now, at this time, came R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney in behalf of the Government; came also the defendant, in the custody of the United States Marshal with his attorney, Louis K. Pratt; came also the jurors heretofore sworn to try the issues in the above-entitled cause, in charge of their sworn bailiffs, and being called and each answering to his name as present, said trial was resumed and the following proceedings had, to wit:

Opening statement was made by R. F. Roth, United States Attorney, in behalf of the Government, followed by statement by Louis K. Pratt, Esq., in behalf of the defendant.

Grace Carey was duly sworn and testified in behalf of the Government.

At 10:50 o'clock A. M., the jury having been duly admonished retired in charge of their sworn bailiffs, during argument before the Court.

At 11:25 A. M., the jury returned into Court, in charge of their sworn bailiffs, and it was stipulated by respective attorneys that all were present.

Grace Carey resumed the stand and testified in behalf of the Government.

At 11:50 o'clock A. M., the jury having been duly admonished were excused in charge of their sworn bailiffs, until 1:45 o'clock P. M. [24]

Court declared recess until 1:45 o'clock P. M.

1:45 P. M.

Hereafter, at 1:45 o'clock P. M., said trial was resumed, R. F. Roth, U. S. Attorney, Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys appearing in behalf of the Government and the defendant appearing in the custody of the United States Marshal with his attorney, Louis K. Pratt; came also the jurors heretofore sworn to try the issues in the above-entitled cause, in charge of their sworn bailiffs, whereupon the following proceedings were had, to wit:

Grace Carey resumed the stand and testified further in behalf of the Government.

J. J. Buckley, Laura Herington and James J. Fairborn were each duly sworn and testified in behalf of the Government.

Marion Carey was duly sworn and testified in behalf of the Government.

Government rests.

At 2:16 o'clock P. M., the jury having been duly admonished, retired in charge of their sworn bailiffs during argument of defendant's motion for an instructed verdict, which motion was denied by the Court, to which ruling, defendant notes an exception, which exception is allowed.

Hereupon the jury returned into Court in charge of their sworn bailiffs and it was stipulated by respective counsel that all were present.

J. P. Rose, defendant herein, was duly sworn, and testified in his own behalf.

At 2:55 o'clock P. M., the jury having been duly admonished were excused in charge of their sworn bailiffs.

Court declared recess until 3:10 o'clock P. M.

3:10 P. M.

At 3:10 o'clock P. M., came respective parties and counsel as heretofore; came also the defendant in the custody of the United [25] States Marshal; came likewise the jury heretofore sworn to try the issues in the above-entitled cause in charge of their sworn bailiffs, and it was stipulated by respective parties that all were present, whereupon the following proceedings were had, to wit:

J. P. Rose, resumed the stand and testified in his own behalf.

J. J. Patton was duly sworn and testified in behalf of defendant.

At 3:40 o'clock P. M., the jury, having been duly admonished, retired in charge of their sworn bailiffs, during argument relative to the introduction of certain testimony of J. J. Patton to which plaintiff objects.

At 4:10 o'clock P. M., the jury having returned into Court, in charge of their sworn bailiffs and it having been stipulated by respective counsel that all were present, said trial was resumed.

Plaintiff's objection to the introduction of certain testimony sustained, to which ruling defendant notes an exception, which exception is allowed.

Hereupon, the jury having been duly admonished, were excused in charge of the sworn bailiffs until 10 o'clock A. M., Tuesday, April 4th, 1916.

CHARLES E. BUNNELL,
District Judge. [26]

[Title of Court and Cause.]

Minutes of Trial—Apr. 4, 1916.

Now, at this time, came R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney in behalf of the Government; came also the defendant, in the custody of the United States Marshal with his attorney, Louis K. Pratt, Esq.; came likewise the jury heretofore sworn to try the issues in the above-entitled cause, in charge of their sworn bailiffs, and being called and each answering to his name as present, said trial was resumed and the following proceedings had, to wit:

Andrew Anderson was duly sworn and testified in behalf of defendant.

At 10:10 o'clock A. M., the jury, having been duly admonished, retired in charge of their sworn bailiffs during argument as to the admission of certain testimony. Hereupon, objection of the Government having been withdrawn, the jury returned in charge of their sworn bailiffs and it was stipulated by respective attorneys that all were present.

Andrew Anderson resumed the stand and testified further in behalf of defendant.

F. Bishoprick, Wm. H. McPhee and Thomas Keel

were each duly sworn and testified in behalf of defendant.

Defendant rests.

F. B. Hall and J. H. Miller, Deputy United States Marshals were each duly sworn and testified in behalf of plaintiff.

Plaintiff rests. Defendant rests. [27]

At 11:06 o'clock A. M., opening argument was made by F. R. Roth, United States Attorney.

Hereupon, the jury having been duly admonished, were excused in charge of their sworn bailiffs until 2 o'clock P. M.

Court declared recess until 2 o'clock P. M.
2:00 P. M.

Thereafter, at 2 o'clock P. M., came R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney in behalf of the Government; came also the defendant in the custody of the United States Marshal with his attorney, Louis K. Pratt; came likewise the jury heretofore sworn to try the issues in the above-entitled cause in charge of their sworn bailiffs, and being called, each answered to his name as present, whereupon, said trial was resumed and the following proceedings had, to wit:

Argument was made by Louis K. Pratt, Esq., in behalf of the defendant.

Hereupon, the jury having been duly admonished, were excused in charge of their sworn bailiffs until 3:40 o'clock P. M.

Court declared recess until 3:40 o'clock P. M.

3:40 P. M.

Thereafter, at 3:40 o'clock P. M., came the defendant in the custody of the United States Marshal; came also the jury, heretofore sworn, in charge of their sworn bailiffs and being called, each answered to his name as present; came likewise the respective parties and attorneys as heretofore, whereupon the following proceedings were had, to wit:

Closing argument was made by R. F. Roth, United States Attorney.

Thereafter the Court proceeded to read its instructions to the jury as to the law in the case and R. K. Latimer and S. T. Kincaid having been sworn as bailiffs in charge of said jury, at 5:30 o'clock P. M., the jury retired in charge of their sworn bailiffs to deliberate upon their verdict.

Court adjourned until 10 o'clock A. M., Wednesday, April 5th, 1916, subject to receiving the verdict of the jury now deliberating. 11:02 P. M.

11:02 P. M.

Thereafter, at 11:02 P. M., came R. F. Roth, United States Attorney [28] and Reed W. Heilig, Assistant United States Attorney in behalf of the Government; came also the defendant in the custody of the United States Marshal with his attorney, Louis K. Pratt, Esq., came likewise the jury heretofore sworn to try the issues in the above-entitled cause, in charge of their sworn bailiffs, and being called and each answering to his name as present, said jury did present, by and through their foreman, in open Court, their verdict which is in words and figures following, to wit:

“[Title of Court and Cause].

VERDICT.

We, the jury in the above-entitled action, duly impaneled and sworn, find the defendant, J. P. Rose, guilty of the crime of rape as charged in the indictment.

Dated April 4, 1916.

GEO. W. KNAPP,
Foreman.”

which said verdict was received by the Court and ordered filed with the clerk of the Court and the jury excused from further deliberation in this cause. Members of the regular panel of petit jurors to report at 10 o'clock A. M., Wednesday, April 5th, 1916.

CHARLES E. BUNNELL,
District Judge, [29]

[Title of Court and Cause.]

Verdict.

We, the jury in the above-entitled action, duly empaneled and sworn, find the defendant, J. P. Rose, guilty of the crime of rape as charged in the indictment.

Dated: April 4, 1916.

GEO. W. KNAPP,
Foreman.

Entered in Court Journal No. 13, Page 491.

[Endorsed]: Filed Apr. 4, 1916. [30]

[Title of Court and Cause.]

Minutes of Court—Apr. 8, 1916.

Now, at this time, came Reed W. Heilig, Assistant United States Attorney in behalf of the Government; came also the defendant in the custody of the United States Marshal and with his attorney, Louis K. Pratt, and

It is hereby ordered that the defendant's motion for a new trial in this cause be, and the same hereby is, fixed for hearing at 7:30 o'clock P. M., Tuesday, April 11th, 1916.

CHARLES E. BUNNELL,
District Judge. [31]

[Title of Court and Cause.]

Minutes of Court—Apr. 11, 1916.

Now, at this time, R. F. Roth, United States Attorney and Harry E. Pratt, Assistant United States Attorney, appearing in behalf of the Government; came also the defendant in the custody of the United States Marshal and with his attorney, Louis K. Pratt, and defendant's motion for a new trial in this cause having previously been set for hearing at this time, now,

It is ordered that said hearing on defendant's motion for a new trial in this cause be, and the same hereby is, reset to 10 o'clock A. M., Wednesday, April 12th, 1916.

CHARLES E. BUNNELL,
District Judge. [32]

[Title of Court and Cause.]

Minutes of Court—Apr. 12, 1916.

Now, at this time, came R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney, in behalf of the Government; came also the defendant in the custody of the United States Marshal with his attorney, Louis K. Pratt, Esq., defendant's motion for a new trial herein coming on regularly to be heard before the Court and after argument by counsel for defendant, the matter was continued to 2 o'clock P. M., this day.

CHARLES E. BUNNELL,
District Judge. [33]

[Title of Court and Cause.]

Minutes of Court—Apr. 12, 1916.

Now, at this time, came R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney, in behalf of the Government; came also the defendant in the custody of the United States Marshal with his attorney, Louis K. Pratt, Esq., and hearing on defendant's motion for a new trial was continued, and after argument, and the Court being fully advised in the premises,

It is ordered that said motion for a new trial herein be, and the same hereby is, denied, and defendant was remanded to the custody of the United States Marshal to await sentence.

CHARLES E. BUNNELL,
District Judge. [34]

[Title of Court and Cause.]

Minutes of Court—Apr. 12, 1916.

Now, at this time, R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney, appearing in behalf of the Government, and the defendant appearing in the custody of the United States Marshal with his attorney, Louis K. Pratt,

It is ordered that the time for pronouncing judgment and sentence upon the defendant herein be, and the same hereby is, fixed at 4 o'clock P. M., Wednesday, April 12th, 1916.

CHARLES E. BUNNELL,
District Judge. [35]

*In the District Court for the Territory of Alaska,
Fourth Judicial Division.*

NO. 722—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. P. ROSE,

Defendant.

Judgment.

Now, at this time, to wit, April 12, one thousand nine hundred and sixteen, the same being one of the regular February, 1916, term days of this court, this cause came on regularly for the pronouncement of the judgment and sentence of the Court upon the defendant, J. P. Rose. The defendant appeared in

person and by his attorney, Louis K. Pratt, and the United States appeared by R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney.

It appears to the Court, and the Court so finds, that the defendant J. P. Rose, was, by a lawful and regular Grand Jury for the aforesaid division, duly and regularly indicted upon the 1st day of March, 1916, and charged with the crime of rape, alleged in said indictment to have been committed upon the 1st day of June, 1913, at Fairbanks, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, upon Grace Carey, a female child of the age of twelve years, he, the said J. P. Rose, being a male person over the age of twenty-one years.

It further appears to the Court that the defendant was duly and regularly arraigned upon said indictment and plead not guilty thereto and that upon the 31st day of March the 1st, 3d and 4th days of April, 1916, the same having been theretofore regularly appointed as the time for the trial of this cause, a jury of twelve men was duly and regularly empaneled and sworn; evidence introduced on behalf of plaintiff and defendant; arguments of counsel had, and the jury instructed as [36] to the law of the case; and said jury, upon said 4th day of April, 1916, retired to consider its verdict and upon the same day returned the same into court, which was in words and figures as follows, to wit:

“[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled action, duly impaneled and sworn, find the defendant, J. P. Rose, guilty of the crime of rape as charged in the indictment.

Dated April 4, 1916.

GEO. W. KNAPP,
Foreman.”

That thereafter, defendant filed a motion for a new trial which was heard and overruled and upon this 12th day of April, 1916, the same having been heretofore regularly designated as the time for the pronouncement of the judgment and sentence of the Court, and the defendant having been asked if he has anything to say why judgment should not be pronounced upon him, and he having replied in the negative, and the Court being fully advised in the premises,

IT IS ADJUDGED that the defendant, J. P. Rose, is guilty of the crime of rape as charged in said indictment and in accordance with the aforesaid verdict, and it is the judgment and sentence of the Court that the defendant, J. P. Rose, shall be imprisoned in the United States penitentiary at McNeil's Island, County of Pierce, State of Washington, for a period of eight years, and the United States Marshal is ordered to deliver said defendant to said penitentiary for the execution of this sentence.

Dated at Fairbanks, Alaska, this 12th day of April, 1916.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 509.

[Endorsed]: No. 722-CR. In the District Court of the United States for the Territory of Alaska. United States of America vs. J. P. Rose. Judgment. Filed in the District Court, Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [37]

[Title of Court and Cause.]

Minutes of Court, April 12, 1916.

Now, at this time, came R. F. Roth, United States Attorney, and Harry E. Pratt, Assistant United States Attorney, in behalf of the Government; came also the defendant in the custody of the United States Marshal with his attorney, Louis K. Pratt, Esq., upon oral motion of counsel for defendant that the time be fixed within which defendant may make, serve and tender his Bill of Exceptions herein, and there being no objection,

It is ordered that counsel for defendant may have until August 1st, 1916, within which to make, serve and tender his Bill of Exceptions herein.

CHARLES E. BUNNELL,
District Judge. [38]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED that this case came on regularly for trial in the above-entitled court at 10 o'clock A. M. on Friday, March 31, 1916, Honorable Charles E. Bunnell, Judge of said court, presiding. United States Attorney R. F. Roth appeared on behalf of the Government, and Louis K. Pratt appeared as attorney for the defendant. The defendant was present at all times during the trial and proceedings in the case, and the jury, during all recesses and continuances, were kept together in charge of bailiffs in that behalf sworn. Proceedings were regularly taken to impanel a jury, and a jury of twelve men were duly impaneled and sworn to try the case, at the evening session of court on April 1, 1916, whereupon the trial was continued until 10 A. M. Monday, April 3, 1916.

At 10 o'clock A. M. April 3, 1916, after opening statements made by R. F. Roth, Esq., on behalf of the Government, and by Louis K. Pratt, Esq., on behalf of the defendant, the following proceedings were had and testimony was taken: [39]

Testimony of Grace Carey, for Plaintiff.

GRACE CAREY, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. Grace Carey.

Q. Where do you live?

(Testimony of Grace Carey.)

A. Fourth and Barnette.

Q. How old are you? A. Fifteen.

Q. When was your birthday?

A. 23d of March.

Q. Are you acquainted with J. P. Rose, the defendant? A. Yes.

Q. How long have you known him?

A. I don't know. Ever since I can remember.

Q. Do you know what business he has?

A. Yes.

Q. What is his business?

A. He repairs bicycles and things like that.

Q. A repair shop? A. Yes.

Q. Have you gone to school in Fairbanks?

A. Yes.

Q. How long?

A. About five years, five and a half. About five or five and a half years.

Q. What grade were you in when you quit school?

A. The sixth.

Q. Did you know two girls, one by the name of Vera Kelley and [40] the other, Grace Kelley.

A. No. Vera and Agnes Kelley.

Q. Now, with reference to the time, do you remember when they left the town of Fairbanks—the Kelley girls, I mean?

A. About two years ago last summer.

Q. Now, while they were here in town during that summer, did you go to the bicycle shop of this defendant? A. Yes, I did.

Q. Just tell this jury what occurred between you

(Testimony of Grace Carey.)

and this defendant in his shop the time when the Kelley girls were here two years ago last summer.

A. I had sexual intercourse with him.

Mr. PRATT.—Wait a minute. What time are you talking about now?

Mr. ROTH.—I will fix the time now. I fix it about three weeks before the time the Kelley girls left here.

Q. About how long was this before the time that the Kelley girls left here that you say you had sexual intercourse with Rose in his— (Interrupted.)

(Defendant states that that assumes something she has not testified to, and moves to strike the last answer. Motion denied. Defendant excepts. Exception allowed.)

Q. How long was it before the Kelley girls left here? A. About three weeks.

Q. Where did this act of sexual intercourse take place? A. In the shop of Mr. Rose.

Q. What part of the shop?

A. In the back part where he lived.

Q. What was in that back part there?

A. I can't tell everything that was in it.

Q. But some of the general things. What did he have in there? [41]

A. He had a stove and a table and a bed.

Q. All right. That is all I care for now. What part of that back room was it that this act of sexual intercourse took place? Was it on the bed?

A. Yes.

Q. How were you lying on the bed?

(Testimony of Grace Carey.)

(Defendant asks that the time be fixed. Plaintiff's attorney states that he cannot fix the time at once, but will prove the exact time that the Kelley girls left.)

Q. How were you lying on the bed? Do you understand my question? At the time that this act of sexual intercourse took place, how were you lying?

A. On my back.

Q. And how was the defendant lying?

A. On top of me.

Q. Had you removed any of your clothing?

A. No.

Q. What did you do, if anything, with reference to your clothing?

A. I unfastened my underdrawers.

Q. Did Mr. Rose remove any of his clothing?

A. No.

Q. What did he do with reference to his clothing, if anything? A. Opened the front of his clothing.

Q. Was this in the daytime or the night-time or the evening? A. It was in the daytime.

Q. What was done, if anything, by Mr. Rose before he committed this act of sexual intercourse?

A. Locked the door of the shop.

Q. What did he say to you at that time, if you remember? [42]

A. He told me he had done this with some other girls, friends of mine.

Q. Did he say anything else to you that you remember on the subject of your telling, or anything like that?

(Testimony of Grace Carey.)

A. Yes. He told me if they would ever get me up any place and ask me if he had ever had sex—if he had done anything like this to me, to say no. He said, no matter if you do say no, that they couldn't prove it, and would have to take my word for it.

Q. Was that the first time he had ever had sexual intercourse with you?

A. No. He had once before.

Q. How long before that?

A. About a week or two.

Mr. PRATT.—I move to strike that out. The indictment says this occurred about the first of June, and other acts would have to be prior to that. Apparently, now, from Mr. Roth's statement, the Government is going to rely on an act of sexual intercourse about the 4th of July. (Argument. Motion denied.)

Mr. ROTH.—Q. And where did that act of sexual intercourse take place, you say the one before this time? A. At his shop.

Q. At the same place? A. Yes.

Q. How was that bed fixed or placed? Was that bed so that it could be seen from the street, from the window? A. No.

Q. Why couldn't you see it from the street through the window?

A. Because there was a partition between the two rooms. [43]

Q. Now, before the time that you had sexual intercourse with this defendant as you have stated

(Testimony of Grace Carey.)

here, had you been to Mr. Rose's shop?

A. Yes. Lots of times.

Q. What did you go there for?

A. To get a bicycle.

Q. Would you get it? A. Yes.

Q. Did you get a bicycle from him many times?

A. Yes.

Q. Would you get anything else there?

A. He would give us candy, oranges and apples, and money.

A. And money? A. Yes. Bingles.

Q. Were you and he always friendly before that, good friends? A. Yes.

Q. Did you ever have any difficulty of any kind with him before that? A. No.

Q. State whether or not you had often gone back into his living-room or bedroom before this act of sexual intercourse.

A. Why, yes, I went back there a few times, but he wouldn't always be back there.

Q. Were you always made welcome there?

A. Yes.

Q. Has he tried to have sexual intercourse with you since that time?

(Defendant objects to anything subsequent. Sustained.) [44]

Q. Did he hurt you when he had sexual intercourse with you? A. Yes.

Q. How does it come that you didn't have sexual intercourse with him more than you did have? (Objection. Sustained.)

(Testimony of Grace Carey.)

Q. This summer—I mean this winter, just after the Grand Jury convened here, were you in Mr. Rose's place of business in this town? A. Yes.

Q. Who was with you? A. Laura Herrington.

Q. What did Mr. Rose say to you at that time?

A. He told me— (Interrupted.)

(Defendant objects as irrelevant, incompetent, immaterial. Nothing to show that it has any materiality. Objection overruled.)

Q. What did he tell you?

A. He said: "You girls better be careful, because the Grand Jury is in session now."

Q. There is one thing I want to ask you: Were you ever married? A. No.

Q. And this defendant is not your husband?

A. No.

Mr. ROTH.—You may cross-examine the witness.

Cross-examination.

(By Mr. PRATT.)

Q. Grace, isn't this about what Mr. Rose told you and Laura? He knew both of you well, didn't he, at that time when the Grand Jury was in session you talked with him? A. Yes.

Q. He knew you both for a number of years, didn't he? [45] A. Yes.

Q. Didn't he tell you, in effect, that you and Laura had better be careful how you sported around with men during the session of the Grand Jury; that you would get into trouble? Aint that about what he said? A. No. He didn't.

Q. He didn't? A. No.

(Testimony of Grace Carey.)

Q. What do you say he did say?

A. He said: "You girls had better be careful, because the Grand Jury is in session."

Q. Didn't you know what that meant?

A. Well, I thought he meant us to be careful for him.

Q. Be careful of him? A. For him.

Q. For him? A. Yes.

Q. He didn't say so, though, did he? A. No.

Q. And you didn't think he had in mind, now, that you had better be careful about sporting with other men; that you would get yourselves in trouble. You didn't put that construction on it, did you?

A. No.

Q. No. Where were you born, Grace?

A. In Circle City, Alaska.

Q. What year? A. 1901.

Q. What month and day?

A. The 23d day of March.

Q. Do you know how old you were when you were brought over here to Fairbanks? [46]

A. No. I don't.

Q. Do you know what year it was?

A. No. I don't.

Q. You have lived here about as long as you can remember back, haven't you? A. Yes.

Q. Grace, now you have told the jury that you were fifteen years old the 23d day of March, haven't you? A. Yes.

Q. Of this year? A. Yes.

Q. Now, you took a trip on the boats this last

(Testimony of Grace Carey.)

summer, 1915, didn't you, to Iditarod? (Objected to. Overruled.) A. Yes.

Q. What boat did you go down on?

A. On the "Tanana" and then on the "Washburn."

Q. How far did you go on the "Tanana"?

A. To Holy Cross.

Q. There you took the "Washburn."

A. From Holy Cross to this side of Dikeman; then we got on the "Prairie Belle" to Dikeman.

Q. "Prairie Belle" at Dikeman.

A. To Dikeman. I came back and took the "Washburn."

Q. You didn't stay there. You turned right around and came back?

A. I did not. I stayed in Dikeman a while with my sister; then I went up to Iditarod and stayed awhile there.

Q. And when you came back you took the "Washburn" again. A. To Tanana. Yes, sir.

Q. To where? A. To Tanana. [47]

Q. You took the "Washburn" at Tanana?

A. To Tanana.

Q. How many days were you on the "Washburn," altogether? A. I don't remember.

Q. Well, it was ten or twelve days, wasn't it?

A. No.

Q. Going up and coming back?

A. I only went on the "Wishburn" from Dikeman to Tanana. I didn't come back later.

(Testimony of Grace Carey.)

Q. You went on the "Washburn" from Holy Cross to Dikeman?

A. Yes. Then the "Washburn" came back to Holy Cross, and I stayed at Dikeman and I was up at Iditarod in the meantime.

Q. When did you get on the "Washburn" again?

A. The "Washburn" came back to Dikeman.

Q. So that you were on the "Washburn" altogether about ten or twelve days or more?

A. Not all at one time, though.

Q. I know, but altogether.

A. I don't know.

Q. You got pretty well acquainted on that boat, didn't you?

(Objection—Overruled.)

Q. You got pretty well acquainted on that boat with the purser and officers, and the cabin boys and cooks and waiters, didn't you? A. Yes.

Q. Grace, do you remember the name of the purser? A. Yes, sir.

Q. What is his name? A. Chester. [48]

Q. Chester H. Marshall. Would that be his name? A. Yes.

Q. You were around him a good deal, wasn't you, talked with him a good deal? A. No. I wasn't.

Q. Didn't you, while you were on the "Washburn," go to Mr. Chester H. Marshall, the purser, and solicit him to have sexual intercourse with you, and that he told you that he had a wife on the outside, and that you were a young girl; and didn't you come right back and say to him, in order to induce

(Testimony of Grace Carey.)

him to have sexual intercourse with you, that you were then over sixteen years of age?

(Plaintiff objects as irrelevant, incompetent, immaterial and not cross-examination.)

Mr. PRATT.—She has testified here that she is fifteen years old. Now, if I can show that she told Marshall that she was 16 last summer—(Interrupted)

The COURT.—Then ask her the question if she told Mr. Marshall that she was sixteen years old last summer.

Mr. PRATT.—I have asked it.

The COURT.—Objection sustained to the question as asked.

Mr. PRATT.—Q. Didn't you, on that trip, while you were on the "Washburn," tell the purser, Mr. Marshall, that you were over sixteen years of age?

A. I did not.

Q. Grace, didn't you, while you were on that "Washburn"—didn't you have sexual intercourse generally with the cabin boys and cooks and everybody there that would have sexual intercourse with you? [49]

(Plaintiff objects as irrelevant, incompetent, immaterial and not cross-examination.)

The jury withdraw from the courtroom in charge of the bailiffs, after receiving the usual admonitions from the Court.

After argument, the jury return to the courtroom.

Objection sustained. Defendant excepts, and is allowed an exception.)

(Testimony of Grace Carey.)

Mr. PRATT.—Read the question.

Mr. ROTH.—I don't see why it is necessary to read that question, and I object to the question being read again.

The COURT.—You may read the question.
(Question read.)

Mr. PRATT.—Q. You made the trip on the "Tanana," now, from the town of Fairbanks, here, clear down to Holy Cross, didn't you? A Yes.

Q Then, when you got back to Gibbon, you took the "Tanana" again and came on to Fairbanks.

A. I did not. I took the "Yukon" and met the "Tanana."

Q. The "Tanana" was there?

A. The "Tanana" was not there.

Q. It wasn't. A. No.

Q. You met the "Tanana" on the river here.

A. Yes.

Q. Now, Grace, while you were making that trip on the "Tanana" from Fairbanks to Holy Cross, who was the purser?

A. I have forgotten what his name was.

Q. I will give it to you; E. P. Bemis. A. Yes.

Q. You got pretty well acquainted with him, didn't you?

A. Why, yes. I knew him a long time, anyway.

Q. You got pretty well acquainted with all the men on the upper [50] deck there, cooks, waiters and officers? A. Yes.

Q. Mr. Bemis is a rather elderly man, fifty or sixty years old, isn't he? A. I don't know his age.

(Testimony of Grace Carey.)

Q. Aint he along in age, something like that?

A. I don't know.

Q. He is not a young man, is he?

A. He may be young, for all I know.

Q. He may be young, for all you know.

A. Yes.

Q. You have seen him here in Fairbanks, haven't you? A. Yes.

Q. You saw him on that trip, and you can't say now whether he is a young or old man. Is that it?

(Plaintiff objects.)

Q. Do you know whether he is a young man or an old man. A. He is not very young. No.

Q. Grace, on that trip, somewhere along—I will ask you another question before that. Isn't it true that on that trip you would go into the purser's room—(Interrupted)

A. I was only in there once, and the door was open while I was in there.

Q. Yes. Was Mr. Bemis there?

A. Of course he was.

Q. Now, Grace, didn't you solicit Mr. Bemis to have sexual intercourse with you—Wait—(Interrupted)

A. I—(Interrupted)

Q. Wait a minute. And didn't he tell you that he had a wife on the outside and that you were a young girl; and didn't [51] you tell him: "Oh, I am over sixteen years of age. It will be all right."

A. I did not.

Q. You didn't. A. Of course I didn't.

(Testimony of Grace Carey.)

Q. Nothing of that kind happened. A. No.

Q. Didn't you say that to somebody on that boat?

A. I did not.

Q. Didn't you say that to somebody?

A. I did not.

Q. Didn't you have sexual intercourse generally on that boat? A. I did not.

Q. You didn't? A. No.

Q. With nobody? A. With nobody.

Q. Nobody at all? A. No.

Q. Well, well.

A. Dan Callahan was the last man.

Mr. ROTH.—I object to counsel making that statement to this young girl on the stand. I think that his conduct is not becoming of an officer of this court, and I think he ought to be called down for it.

The COURT.—Now, Mr. Pratt, the Court has already ruled on a question of that kind, and it ought not to be necessary for the Court to rule on the same proposition again.

Mr. PRATT.—I want to make a record. I will ask the questions and the Court can rule.

The COURT.—You may make your record right now on this proposition and the Court directs you not to ask questions of that kind [52] again.

Mr. PRATT.—No questions of that kind again?

The COURT.—Certainly not, for the Court has ruled on it.

Mr. PRATT.—This question had reference and value also in regard to her age.

The COURT.—All right. The Court has indi-

(Testimony of Grace Carey.)

icated to you that you can ask her with regard to statements made in regard to her age, and, if that is your purpose, you need not put a lot of other things in it. You understand the Court's ruling on this matter.

Mr. PRATT.—I understand the Court's ruling, but I thought I had a right to ask questions of that kind so as to make a record. I guess I better not try it. I was going to ask her a question with regard to when she was at Gibbon.

The COURT.—The Court has ruled in regard to that matter.

Mr. PRATT.—I can't ask those questions and make a record?

The COURT.—No, sir.

Mr. PRATT.—All right. I understand.

Q. Grace, you were before the Grand Jury here in February this year, wasn't you? A. Yes.

Q. How many times? A. Twice.

Q. No more than that? A. No.

Q. Who sent for you and where did you go and who did you talk to about giving testimony before the Grand Jury? A. I went to Mr. Roth.

Q. To Mr. Roth? A. Yes. [53]

Q. Did he send for you? A. Of course he did.

Q. Who did he send to get you? A. Joe Miller.

Q. Joe Miller? A. Yes,

Q. And you came up and talked to him.

A. Yes.

Q. And you told him all about all these things.

A. Yes.

(Testimony of Grace Carey.)

Q. You told him you had sexual intercourse with a great many different men here in town, didn't you?

A. I did not. I named the men.

Q. You named the men. A. Yes.

Q. Did you name all of them? A. Yes.

Q. Did you name Mr. Rose?

A. Yes, of course I did.

Q. You are sure of that, are you?

A. Yes. I am sure of it.

Q. Yes. Grace, when you first went before the Grand Jury, wasn't you asked by the Grand Jury how many men here you had had sexual intercourse with, and didn't you tell them: "I could name fifty, and there were more." A. I did not.

Q. Nothing like that? A. No.

Q. How many did you tell them that you could name?

(Plaintiff objects as irrelevant, incompetent, immaterial and not cross-examination. 'Objection sustained.)

Q. How many did you try to name—the number?
[54]

(Plaintiff objects on all the grounds last stated. Objection sustained.)

Mr. PRATT.—I want to show that she did name them, but didn't name Mr. Rose.

Mr. ROTH.—She has already stated—(Interrupted)

Mr. PRATT.—I will ask her that question. Of course, she will deny it, but that is all right.

Mr. ROTH.—I want to go on record as attorney

(Testimony of Grace Carey.)

for the Government that that statement of counsel is reprehensible.

The COURT.—The statement of counsel may be stricken from the record, and the jury instructed to entirely disregard it.

Mr. PRATT.—Q. Grace, didn't you undertake, before the Grand Jury, to give the names of the men that you had had intercourse with,—sexual intercourse with?

Mr. ROTH.—She has already answered that. She said she did.

The COURT.—The question has been answered, Mr. Pratt.

Mr. PRATT.—Q. Did you say you did?

A. Why, no.

Q. To the Grand Jury? Did you try to tell the Grand Jury the number of men that you had sexual intercourse with?

A. I didn't try, but I told them.

Q. You told them. A. Yes.

Q. Was Mr. Rose one of them?

A. Yes, of course he was.

Q. You are sure he was. A. Yes. [55]

Q. Yes? The first time you went to the Grand Jury and gave testimony, did you give testimony about this transaction with Mr. Rose that you have been telling about?

(Plaintiff objects. Overruled.)

A. I don't think I did.

Q. You don't think you did.

Mr. ROTH.—The first time he was not under in-

(Testimony of Grace Carey.)

quiry. It was another matter that was being inquired into.

Mr. PRATT.—Q. Now, Grace, how long after that was it before you went before the Grand Jury again?

A. I think it was the day after.

Q. The day after?

A. I think—(Interrupted)

Q. Wasn't you there after Mr. Wooldridge was indicted? A. I don't know what he means.

Q. You know when Mr. Wooldridge was indicted—W. H. Wooldridge. Don't you remember now the second time you went to give testimony before the Grand Jury was after Mr. Wooldridge had been indicted?

A. It was after. It had been told to the Grand Jury. Yes.

Q. Mr. Rose was a witness there in the Wooldridge case too? A. I don't know.

Q. Didn't you see him there?

A. I saw him standing downstairs.

Q. Standing downstairs. You had another conversation with Mr. Roth before you went before the Grand Jury the second time?

A. I have had lots of conversation with him. I don't know. [56]

Q. How many do you think you had?

A. I don't know.

Q. Talked all about these matters with him, haven't you? A. Why, yes.

Q. Yes. Didn't he tell you, before you went before the Grand Jury the second time, that he wanted you

(Testimony of Grace Carey.)

to tell about Mr. Rose; that he wanted to get an indictment against Mr. Rose?

A. He did not. He told me to tell the truth and only the truth.

Q. The truth and nothing but the truth?

A. Yes.

Q. When he got you down in the grand jury-room he asked you about Mr. Rose, didn't he?

A. I don't remember whether he asked me, or whether he told me to name the other men.

Q. Anyway, the first time you mentioned Mr. Rose was when you were before the grand jury the second time, wasn't it? A. Yes.

Q. Yes. Now, Grace, haven't you owned a bicycle here in the last couple of years of your own?

A. Why, yes.

Q. For what length of time did you own a bicycle?

A. I don't know.

Q. About how long?

A. Only a few months.

Q. A month or a year?

A. Only a few months.

Q. Only a few months? When was that?

A. I don't know. The Kelley girls gave it to me. I don't know whether it was after they left or not.

[57]

Q. That would be 1913?

A. I don't know whether they were here—(Interrupted)

Q. You don't know when it was. And you kept it a few months, and what became of it?

(Testimony of Grace Carey.)

A. I sold it.

Q. You sold it? A. Yes.

Q. Now, while you had that you took that to Mr. Rose and got it repaired occasionally.

A. About once, yes.

Q. About once? A. Yes.

Q. You had skates all this time, didn't you?

A. Yes.

Q. And you took your skates there and got them mended.

A. I took skates there once for my sister.

Q. She had a pair of skates. A. Yes.

Q. You don't remember of taking your own skates there?

A. I have not got any skates of my own.

Q. You haven't got any. A. No.

Q. Anyway, between the skates and the bicycle you went to Mr. Rose's shop frequently in 1913, 14 and 15?

A. Not for the bicycle or the skates. No.

Q. You didn't?

A. No. I was only there two or three times for that.

Q. What did you go there for other times?

A. Just because I wanted to get the bicycle.

Q. He had a bicycle there that he loaned to you girls?

A. He loaned it to all the girls in town.

Q. All the girls, white and half breed girls, *hey*, whenever they asked him, didn't he? [58]

A. I am sure I don't know his business.

(Testimony of Grace Carey.)

Q. You know he loaned it to you when you asked for it, and you know he loaned it to Laura Herrington and these other half breed girls when they asked for it, don't you? Don't you know that?

A. I know he loaned it to lots of girls, and that is all I know.

Q. Grace, didn't you sometimes, you and Laura, and you and your sister, or yourself alone, go there into Mr. Rose's shop and ask him for a quarter?

A. Yes. Lots of times.

Q. Sometimes he would give it to you and sometimes he wouldn't? A. He always gave it to us.

Q. Always? A. Yes.

Q. Once in a while you asked him for fifty cents to go to one of these shows here where the admission was fifty cents, didn't you? A. Yes.

Q. And he gave you fifty cents a few times?

A. Yes.

Q. Did he refuse you sometimes? A. No.

Q. You are sure of that? A. Yes. I am sure.

Q. Grace, didn't you have a habit when you would go in there, if Mr. Rose wasn't forward in his shop, knowing that he had his bed right back of the partition there, didn't you walk right back in there to see if he was there? A. Why, yes.

Q. That happened often, didn't it? [59]

A. No.

Q. A good many times? A. No.

Q. A few times, then? A. Yes.

Q. Now, when you got back there to the partition,

(Testimony of Grace Carey.)

there is an opening seven or eight feet square, aint there?

A. I know there is an opening. Yes.

Q. Quite a large one. And when you would get back there and look in, you would see Mr. Rose right there on his bed, wouldn't you? A. Yes.

Q. And you would get him to get up and come forward and wait on you. Is that it? A. Yes.

Q. Now, you say that sometime two or three weeks before the Kelley girls went out in 1913, that you went into Mr. Rose's shop, and that you went back—he took you back, or you went back to his room. You told the jury that, haven't you? A. Yes.

Q. Do you know what time that was with reference to the 4th of July?

A. It was just a few days after the 4th.

Q. A few days after the 4th? A. Yes.

Q. You don't know how many days? A. No.

Q. What did you go in there for that day?

A. I went in after the bicycle.

Q. After the bicycle. How much money did you get that day? A. I don't know. [60]

Q. You got some money, did you?

A. Of course I did.

Q. Several dollars? A. I don't know.

Q. You don't know? A. No.

Q. Did you ask Mr. Rose for money?

A. I don't know.

Q. You don't? A. I don't remember.

Q. You don't remember. A. No.

Q. Did anybody go in there with you? A. No.

(Testimony of Grace Carey.)

Q. What time of the day was it?

A. I don't know.

Q. You can't tell anything about that, can you?

A. It was in the afternoon I think.

Q. What? A. I think it was in the afternoon.

Q. Are you sure it was in the afternoon?

A. I don't think I ever got the bicycle in the forenoon.

Q. You think it was in the afternoon?

A. I think it was. Yes.

Q. Do you think it was early in the afternoon?

A. I haven't the least idea.

Q. What?

A. I don't remember whether it was early or late.

Q. How long were you in there?

A. I don't know.

Q. About how long? A. I don't know.

Q. You don't know whether it was five minutes or ten minutes? A. I didn't count the time.

Q. It might have been an hour or two.

A. Yes, for all I know. [61]

Q. And Mr. Rose had the front door locked all the time. A. No. He locked it after I went in.

Q. But he kept it locked all the time you were in there. A. Yes. He did.

Q. And he unlocked it when you got ready to get out. A. Yes.

Q. Yes. That might have been two or three hours for all you know. Where were you all the time you were in the shop that day? A. In the back room.

Q. Lying on the bed? A. Yes.

(Testimony of Grace Carey.)

Q. All the time? A. No.

Q. No. What were you doing the balance of the time? A. Standing up.

Q. Standing up. Did you sit down there at any time in the back room? A. Yes.

Q. Sat there a while. A. Yes.

Q. You had done that lots of times before, gone in and sat down and talked with him? A. Yes.

Q. Where did you go when you left there?

A. I don't know.

Q. How? A. I don't remember.

Q. Did you get the bicycle? A. Yes.

Q. You went bicycle riding then. [62]

A. I suppose so.

Q. Yes. Now, you have told the jury that you had intercourse with him once before that. A. Yes.

Q. About how long?

A. A little over a week or two weeks.

Q. A little over two weeks?

A. I said about a week, or a little after that, or two weeks.

Q. You had had intercourse with a good many men—(Interrupted)

A. I did not.

Q. — before that, hadn't you, and boys?

A. No.

Q. What?

A. I did not have intercourse with no boys.

Q. You don't have anything to do with boys at all?

A. That is no sign I have to have sexual intercourse with them.

(Testimony of Grace Carey.)

Q. But you did have sexual intercourse with older men before that? A. Yes.

Q. And since that you have had sexual intercourse with a great many men, haven't you?

A. I have not.

Q. With quite a number? A. I have not.

Q. With men?

(Plaintiff objects as irrelevant, incompetent and immaterial, objection sustained.)

Q. Grace, do you remember along about 1913 not a very great ways either side of the 4th of July, that you went into Mr. Rose's [63] shop and he was sitting down and that you jumped up and came down with your heel on his toe and hurt him pretty badly?

A. No.

Q. You don't remember that? A. No.

Q. That didn't happen.

A. I don't remember whether it happened, but I don't remember it.

Q. You don't remember. A. No.

Q. Didn't he get angry with you and tell you not to come in there any more?

A. I don't remember it.

Q. He has told you a number of times to keep away from there, and that he didn't want you there?

A. No.

Q. He didn't like you very well.

A. I don't know. He always seemed friendly to me.

Q. Always? A. Yes. Always.

Q. Didn't he, a great number of times, tell you to

(Testimony of Grace Carey.)

go out of the shop? A. He did not.

Q. Did he ever, once?

A. Not that I remember of.

Q. Not that you remember. Grace, do you remember one time that you worked for Mrs. Whitely and took care of her baby a little while? A. Yes.

Q. Do you remember being in Mr. Rose's shop one time after you [64] quit tending to Mrs. Whitely's baby, and another girl come along with the baby in a baby carriage and rolled it into Rose's shop. Do you remember that occurrence? A. No.

Q. And you were there. Do you remember of telling that girl that she had no right to have the care of that baby; that you wanted to be taking care of the baby? A. No.

Q. Didn't you tell her that? A. No.

Q. Isn't it true that that little girl was sitting down in a chair and that you took her by the hair and yanked her and the chair right back onto the floor, or nearly so—Cleora, or some such name? Do you remember the name? A. Yes.

Q. What was her name? A. Cleora Cassidy.

Q. Didn't you take that girl by the hair of the head—(Interrupted)

A. I did not take her by the hair.

Q. — and jerked her backward—(Interrupted).

A. I did not.

Q. — onto the floor?

A. I took her hat and I threw it to the Petree girl, and the Petree girl took it and threw it into the street now.

(Testimony of Grace Carey.)

Q. And then you took the girl by some part of her body and shoved her back over? A. I did not.

Q. You didn't? A. No. [65]

Q. Did you take hold of her at all?

A. No. I just grabbed her hat.

Q. Just grabbed her hat. A. Yes.

Q. You were angry with her because she had got your place. A. I was not.

Q. You were not angry with her at all.

A. Not for that.

Q. What? A. I wasn't angry for that.

Q. Grace, didn't you have some fights there in that shop with some other girls?

(Plaintiff objects as irrelevant, incompetent and immaterial. Defendant states that he wants to show that this witness conducted herself in such a way that Mr. Rose asked her and ordered her out, and tried to make her stay from there altogether; that that is the purpose of the question. The Court overruled the objection.)

Q. Didn't you have fights with Eva Delaney and other white girls in there? A. No.

Q. Not with any of them? A. No.

Q. Not at any time?

A. No. I had no fights with them. I might have said something to them, but I had no fights with them.

Q. You quarreled with them in there?

A. No, I didn't quarrel either.

Q. You didn't. Just talked with them in an ordinary way?

A. No. I might have said something against them.

(Testimony of Grace Carey.)

Q. Something against them? A. Yes.

Q. And didn't Mr. Rose when that occurred, didn't he tell you to get out? A. No. [66]

Q. That he didn't want you in there?

A. No. He used to talk about Eva Delaney himself.

Q. Grace, didn't Mr. Rose have to take you away or off of this girl, Eva Delaney, that you had hold of her hair? A. Why, no.

Q. And didn't he have to pull your hands away from her hair and get you apart? A. He did not.

Q. Nothing of that kind happened.

A. No.

Q. Nothing of that kind happened. A. No.

(Court takes a recess until 1:45 P. M., to-day, and jury withdraw in charge of bailiffs after receiving usual adminitions; and, after recess, the defendant and his attorney, the district attorney and the jury are present, and the trial is resumed; the witness, Grace Carey, on the stand under cross-examination.)

Q. Grace, did you within the last two or three years have a photograph taken when you were nude, with your clothes all off? A. No. I did not.

Q. No such thing. Any such photograph as that of you in this town? A. Why, no.

Q. Grace, when you came back from the Iditarod on the "Washburn," when you got as far as Gibbon, you had to stay there a few days, didn't you?

A. Yes.

Q. About how many days?

A. About three days.

(Testimony of Grace Carey.)

Q. Isn't it true that while you were there that you got acquainted with a good many of those soldiers?
[67]

A. I knew a great many of those soldiers up here.

Q. How is that?

A. I knew a great many of those soldiers when they came up here.

Q. Didn't you get acquainted with them there at Gibbon?
A. I knew them up here.

Q. Listen now. Didn't you get acquainted with the soldiers that are stationed at Gibbon and that didn't come up here?

A. I knew all the band boys and the baseball boys, but I didn't get acquainted with any of them there.

Q. Didn't you get acquainted with them first at Gibbon?

A. No. They were up here before I was down at Gibbon.

Q. They were. Are you sure of that?

A. I know it.

Q. You know it. They were up here playing baseball, and were here several days, were they, last year?
A. Yes. They were.

Q. You got acquainted with pretty much all of them?
A. Yes.

Q. Grace, do you remember an occasion one time out there after a baseball game—now, you have testified to the jury that you have never had any sexual intercourse with young men and boys, I believe, haven't you?

(Testimony of Grace Carey.)

(Plaintiff objects as heretofore testified to. Sustained.)

Q. Grace, do you remember an occasion out there at the baseball park or grounds after the game was over and the crowd was leaving the grandstand and coming down, when a young man, a soldier—he might have been a signal corps man, or he might have been a musician. I don't know about that—he [68] had a uniform on, anyway—was standing right there at the end of the grandstand where the people come down and pass through that little gangway—you know where that is—he was standing there towards the post, that would be nearest the gate that you go out of the yard, and that young man was making a date with you and making arrangements with you to meet him at a certain time at a place down town, and that you told him, yes, you would? A. I did not, now.

Q. You did not? Didn't you see myself and my wife passing there just at that time?

A. I did not, because there was no such thing as that occurred.

Q. There was not? A. No.

Q. You didn't talk to that young man there that had a bicycle right there leaning up against that post, when he was making that arrangement with you? A. He did not, now.

Q. He did not. A. No.

Q. You are sure of that? A. Well, I am sure.

Q. And you didn't have any sexual intercourse with any of those boys? A. I did not.

(Testimony of Grace Carey.)

Q. You was around with them a good deal?

A. I was not.

Q. Was you some?

A. No. I have only danced with them up at the dance.

Q. How did you get acquainted with them?

A. Up at the dance. [69]

Q. You didn't get acquainted with them out there at the fair ground? A. No. I did not.

Q. None of them? A. No.

Q. Grace, when did you tell me, now, that you first commenced telling Mr. Roth about having had sexual intercourse with men?

A. I didn't tell you when I first talked with him.

Q. When was it; how long ago?

A. I don't know. About a month or two. It was before I went before the Grand Jury.

Q. How long before the Grand Jury?

A. I don't know.

Q. Didn't you talk to him last year about it?

A. I did not.

Q. You talked to him as much as a month or two before the Grand Jury met? A.No.

Q. About how long?

A. I don't know, but it was not that long.

Q. Where did you see him and talk with him?

A. Well, he sent for me.

Q. He sent for you. Did you ever talk with him at your home?

A. He has never been up at my home.

Q. He has never been to your home? A. No.

(Testimony of Grace Carey.)

Q. Never once? A. No.

Q. He has not talked to your father and mother?

[70] A. Yes. He talked to them.

Q. But that would be down here too, would it?

A. Yes.

Q. Now, he has advised you a great deal about how you should testify before the jury, has he not?

A. Why, I don't remember anything. All he has told me is to tell the truth. That is all.

Q. Didn't he explain to you the word you used, "sexual intercourse"?

A. Yes. I asked him the word.

Q. He explained that word to you? A. Yes.

Q. You hadn't heard of that word before, had you? A. No.

Q. Grace, didn't Mr. Roth promise you that if you would testify right on the stand now as a witness for the Government in this case, on all these cases, and make the same promise to Laura Herrington, that if you two girls would give testimony favorable to the Government as witnesses on the stand, that he would not send you to the reform school?

A. He did not. He made no promises at all.

Q. Didn't he promise you and Laura that he wouldn't send you to the reform school, but he would send you out to a convent?

A. He did not promise us nothing.

Q. He didn't talk to you.

A. Yes. But he didn't promise. He said he

(Testimony of Grace Carey.)

wouldn't say anything until these trials were all over.

Q. How is that? [71]

A. He said he wouldn't say anything until these trials were all through with.

Q. But he held out the hope to you that he wouldn't send you to the reform school, but he would send you to that convent? A. He did not.

Q. Isn't that what you expect now? A. No.

Q. You knew before the grand jury met that you might be taken in charge?

A. I am not a bit scared of no reform school at all.

Q. Were not you a little bit apprehensive and scared that you might be sent to the reform school?

A. No. I was not.

Q. You was not? A. No.

Q. You did want to go to that convent?

A. I don't care whether I go to that convent or not.

Q. Do you know the Petree girls?

A. Yes, of course I know them.

Q. You know they are out there at that convent.

A. Why, of course.

Q. Didn't you and Laura both want to go out to that convent?

A. We wanted to go, yes, but that was no sign we were going.

Q. You were talking with Mr. Roth about that.

A. We was not. He just suggested that he thought that would be a nice place for us to go, but he didn't promise us anything.

(Testimony of Grace Carey.)

Q. Mr. Roth suggested that would be a nice place for you. A. Yes. [72]

Q. He said that would be a nicer place than a reform school.

A. He didn't say that either.

Q. Now, you and Laura Herrington are great friends, ain't you? A. Why, yes.

Q. You are together a great deal, ain't you?

A. No. We are not together a great deal.

Q. Haven't you been companions very frequently for years, here? A. No. We haven't.

Q. You haven't? A. No.

Q. Haven't you for the last two or three years?

A. No.

Q. How long?

A. This last year was the first time we went together hardly at all, only coming and going to school.

Q. You go down to her house?

A. No. I don't go there very often.

Q. She comes to your house?

A. No, she don't come to my house either very much.

Q. She is about the same kind of a girl you are, ain't she, Grace? A. I don't know.

Q. You don't know. Can't you tell from her talk? Don't you think she is?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection sustained.)

Mr. PRATT.—That is all. [73]

(Testimony of Grace Carey.)

Redirect Examination.

(By Mr. ROTH.)

Q. Mr. Pratt asked you about the first time you talked to me. That was not before the Grand Jury convened here, was it?

A. It was before I went before the Grand Jury.

Q. A day or two or three before you went before the Grand Jury, a few days before you went before the Grand Jury? A. Yes.

Q. I will ask you to state whether or not there was anything said at all between me and yourself about you going anywhere until after you had told your whole story to Joe Miller and myself.

A. No. You didn't say anything until way after that.

Q. All right. Isn't it true that you and Laura Herrington came to Mr. Reid Heilig and myself in my office within the last two weeks, and the two of you together stated that if we couldn't do any better that you girls wanted to be sent to a reform school because you had to get out of this town? A. Yes.

Q. And you couldn't stay here; that people were calling you Indians and that it was impossible for you to remain here and it was necessary for you to get out of the town? A. Yes.

Q. And you would rather go to the reform school than have to stay here? Isn't that true?

A. Yes.

Mr. ROTH.—That is all.

(Testimony of Grace Carey.)

Recross-examination. [74]

(By Mr. PRATT.)

Q. There was further conversation about going to the convent; that that would be still better, wasn't there? Besides talking about the reform school, didn't you, in that same connection, talk about wanting to go— (Interrupted.)

A. We didn't mention about wanting to go to no convent.

Q. No? But Mr. Roth suggested that to you.

A. He said that would be a better place even than the reform school, and we could do better there.

Q. When he suggested that, then you thought so too.

A. Of course we thought it was a better place than a reform school.

Q. You wanted to go to the convent also because of the Petree girls being there, and you knew them. Wasn't that one reason? A. Why, no.

Mr. PRATT.—That will do.

Mr. ROTH.—That is all.

Testimony of John J. Buckley, for Plaintiff.

JOHN J. BUCKLEY, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. John J. Buckley.

Q. What official position, if any, do you hold?

A. City Clerk or Municipal Clerk, and Magistrate,

(Testimony of John J. Buckley.)

and Chief of the Fire Department of the town of Fairbanks. [75]

Q. Have you in your possession the records of the town of Fairbanks? A. Yes, sir.

Q. Have you a record of the registrations of the town? A. Yes, sir.

Q. Have you a record of the registration of Mr. J. P. Rose? A. Yes, sir.

Q. Will you turn to the record, please?

A. I have it here. (Produces book.)

Q. What is that record?

A. An oath taken by Mr. Rose.

Q. On registration? A. On registration.

Q. Is it signed? A. Yes.

Q. By whom? A. By Mr. J. P. Rose.

Q. Is it sworn to? A. Yes, sir.

Q. Before whom?

A. Albert J. Pauli, town registrar and municipal magistrate.

Q. What is the date of it?

A. The 26th day of March, 1915.

Q. Does it disclose the age of Mr. Rose?

A. Yes, sir.

Q. What age does it give? A. Fifty-nine years.

Mr. ROTH.—You may cross-examine.

Mr. PRATT.—That is all. [76]

Testimony of Laura Herrington, for Plaintiff.

LAURA HERRINGTON, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name?

A. Laura Herrington.

Q. How old are you? A. Fourteen.

Q. Are you acquainted with Mr. J. P. Rose, the defendant? A. Yes, sir.

Q. Are you acquainted with Grace Carey?

A. Yes.

Q. I will ask you to state whether or not you went to the place of business of Mr. Rose in the town of Fairbanks, shortly after the Grand Jury convened this year? A. Yes.

Q. What did Mr. Rose say there at the time to you and Grace Carey?

A. He said: "You girls better be careful, because the Grand Jury is in session now."

Mr. ROTH.—You may cross-examine the witness.

Cross-examination.

(By Mr. PRATT.)

Q. Didn't you understand him to mean that you girls better be careful how you were flying around with boys and men and getting into trouble while the Grand Jury was in session? Isn't that what you understood?

A. I don't know. I wish you would speak a little louder.

(Testimony of Laura Herrington.)

Q. Didn't you understand Mr. Rose to mean that you and Grace better be a little careful how you were flying [77] around the streets here, running around the streets with boys and men while the Grand Jury was in session; that you would get yourselves and get them, too, into trouble? Isn't that what he meant? A. No.

Q. Isn't that what you understood?

A. No. I did not.

Q. You didn't. A. No.

Q. You understood something else, then, different from that. How long before the Grand Jury was in session was that, Laura? A. I don't know.

Q. You don't know. Was it a few days or a week or a year or what? A. It was not a year.

Q. Was it six months? A. I don't know.

Q. You don't know. All right. We will let that go.

Mr. ROTH.—That is all.

Testimony of James Fairborn, for Plaintiff.

JAMES FAIRBORN, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. Mr. Fairborn, what position do you hold in the town of Fairbanks?

A. General agent for the White Pass & Yukon Route.

Q. Have you the custody of the list of passengers who sailed on the company's boats from the town of

(Testimony of James Fairborn.)

Fairbanks— A. Yes, sir. [78]

Q. —for the year 1913? A. Yes, sir.

Q. Have you anything of record that will show when Agnes and Vera Kelley left the town of Fairbanks?

A. Yes, sir. I think so. (Examines a paper.)

Q. When did they leave the town of Fairbanks?

A. 24th of July, I believe it was. Yes, July 24th.

Q. What year?

A. 1913, on the steamer "Yukon."

Q. On the steamer "Yukon." A. Yes, sir.

Q. Have you a personal recollection of their going?

A. Well, I just remember the two girls going. That is all.

Mr. ROTH.—You may cross-examine.

Mr. PRATT.—No cross-examination.

Testimony of Marion Carey, for Plaintiff.

MARION CAREY, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. State your name. A. Marion Carey.

Q. Are you acquainted with Grace Carey?

A. Yes, sir.

Q. The witness that has been just on the stand here? A. Yes, sir.

Q. What relation does she bear to you?

A. My daughter.

Q. She is your daughter. A. Yes.

Q. How old is she? [79]

(Testimony of Marion Carey.)

A. She was born in 1901, on the 23d day of March.

Q. Where was she born? A. Circle City.

Q. Was she ever married? A. No, sir.

Q. Is she the wife of J. P. Rose, the defendant in this case? A. No, sir.

Mr. ROTH.—You may cross-examine.

Mr. PRATT.—That is all.

Mr. ROTH. —The Government rests.

Mr. PRATT.—I move the Court to instruct the jury to return a verdict of not guilty on the ground of the insufficiency of the evidence.

The COURT.—If you have a motion you desire to present, I will have the jury withdraw.

Mr. PRATT.—All right.

(The jury, after being admonished as usual, withdraw from the courtroom in charge of the bailiffs. The motion is argued, whereupon the jury are brought into Court.)

The COURT.—The motion presented will be denied.

Mr. PRATT.—We except.

The COURT.—Exception allowed. [80]

Testimony of J. P. Rose, In His Own Behalf.

J. P. ROSE, the defendant, a witness in his own behalf, after being sworn, testified as follows:

Direct Examination.

(By Mr. PRATT.)

Q. Mr. Rose, you are the defendant in this case.

A. Yes, sir.

Q. How long have you lived in Fairbanks?

(Testimony of J. P. Rose.)

A. Since 1907.

Q. What line of business have you followed?

A. Repair-shop most of the time. One year I was steamboating, one summer rather, 1908.

Q. Where has your place of business been for the last two or three years?

A. Between First and Second on Lacey Street.

Q. On Lacey Street between First and Second Avenues, and your shop there is about what depth?

A. Forty-five feet.

Q. And how far is it from the front end to the partition? A. Twenty-nine feet.

Q. Twenty-nine. How much of an opening have you got there? A. I believe it is seven feet.

Q. Seven feet square? A. Yes.

Q. Where is your bed?

A. Just to the right hand as you walk in.

Q. I suppose you have some chairs in there?

A. Yes. One.

Q. There is where you sleep? A. Yes. [81]

Q. What kind of machinery did you have, mechanical machines of different kinds were brought there for you to repair?

A. You mean in my shop?

A. Yes, in your shop.

A. Well, I have a lathe, I have considerable small tools, a motor—My power is furnished with a motor—emery wheel.

Q. What kind of instruments now and implements did you repair?

A. Well, we hardly ever turn anything over that

(Testimony of J. P. Rose.)

we can handle in our shop.

Q. When you repaired, what did you repair?

A. Typewriters, cash registers, bicycles, guns.

Q. Anything about skates?

A. Sharpen skates, yes, sir, and repair them.

Q. Did you have a last there for sharpening your skates?

A. I have an emery wheel to sharpen them, and I have a last there to do any work that is to be done in connection with the skates and the shoes.

Q. Got ammunition for sale? A. Yes.

Q. Shot guns and rifles? A. Yes.

Q. What has been the result of that line of business in the matter of attracting to your shop girls and boys?

A. Well, I would venture to say that there would not be an Indian or a white girl or a boy that has not been to my shop on some errand or other in Fairbanks.

Q. They were there frequently, were not they?

A. Oh, yes. Every day some. [82]

Q. All that had bicycles and all that had skates, and some of them would come to buy ammunition, wouldn't they?

A. Yes, and to borrow and to hire guns.

Q. Borrow and hire bicycles. A. Yes.

Q. Hire guns. A. Yes, sir.

Q. Now, what would fetch these girls there generally? A. The same thing.

Q. What?

(Testimony of J. P. Rose.)

A. Any little thing that they would want, they would come.

Q. What would they usually want?

A. Well, some wanted a bicycle, and some their mother sent them there to get a knife sharpened or shears sharpened, and so on.

Q. Anything to do with their skates at times?

A. Oh, yes. When skating season is on, they come with their skates to get them sharpened.

Q. Now, you take these Indian girls, the Morency girls and the Herrington girls and the Carey girls—(Interrupted).

A. Yes.

Q. You knew them, and they were all there at times? A. Yes, at different times.

Q. And the boys in those families, too.

A. Both the boys and the girls.

Q. What, if any, difference in the deportment of girls, young girls we will say now in your shop, was there between the Indian girls and the white girls that would come there? [83]

A. Oh, there is quite a difference between their behaviour and so on.

Q. Give the jury some idea, generally.

A. If I am laying down back in the back part, and the Indian girls come in, they will bolt right straight on back; but the white girls, if they come in, they will call me.

Q. What are the habits of this Carey girl, that was on the stand here, coming back where your bedroom was?

(Testimony of J. P. Rose.)

A. Oh, she was just bold, would come in and go through everything that you would let her to, generally went over the shop when she would come in.

Q. What, if anything, in the matter of begging money off of you by those Indian girls?

A. Oh, if I would give her money every time she asked me for it, I would have been bankrupt myself. She is always wanting something, and wanting me to get it for her.

Q. Which one? A. Grace.

Q. She had a little sister, didn't she? A. Yes.

Q. A smaller one. Was that child the same?

A. No.

Q. Quite different.

A. As much difference as there was between day and night. She was nice. I liked her. She would come in, and if there would be men standing around, I would give her a bingle or something and tell her to go off and buy some candy, for the simple reason, why, men talking, they would use rough language; and I defy any white girl or Indian girl of ever hearing any rough language from me in my [84] shop, or going away insulted in any way; and I will say, Grace Carey, I have ordered her out of the shop different times, told her to go away.

Q. Now, you say she was very persistent in begging money from you.

A. Oh, yes, very much so.

Q. Did you give her money at any time?

A. Two bits. Sometimes there would be two of them together and they wanted to go to the show,

(Testimony of J. P. Rose.)

and I would give them four bits, but not all the time.

Q. Was there anything that occurred there one time that was particularly disagreeable, back there in 1913, two or three years ago, misconduct by this Carey girl, jumping onto your foot?

A. Oh, that was right in front of the shop. She was—I had a cash register on the bench at the time that I was using myself, and I had to keep it locked on account of her, and just keep the side lock turned all the time and the keys wouldn't go down, and she came in and pounded at those keys a little bit, and then she jumped right sideways on her heel right on my foot. I was sitting down in a chair just like this, and I told her to go on away and not come back any more. She said—(Interrupted)

Q. How long ago was that?

A. Oh, it is a couple of years, maybe two years and a half.

Q. Was there any other instance in there where she made herself particularly disagreeable in the matter of treating other girls?

A. Yes. There was one Sunday I was a-laying down back in [85] my room, Sunday afternoon, and her and Hazel Petree came in and they came on right back and went talking to me; and I says; "Who has come in?" Grace says: "It is Eva. Her Royal Highness Eva," is the way she said it.

Q. What?

A. "Her Royal Highness Eva." And I just raised up, and the two of them went forward then, and I was studying about something and I didn't just come

(Testimony of J. P. Rose.)

out right away. Directly I heard sharp words, then quick steps, and I went out, and the three of them were locked together with their fingers in their hair, and I run right out and took right a-hold of them, and the Petree girl got out of the way, and Grace she used her hands herself, and I had to loose Eva's hands out of Grace's hair, and as soon as I loosed Eva's hands, Grace she ran away, and the next time she came back she accused me of taking sides with Eva.

Q. Of taking sides with Eva. A. Yes.

Q. This is Eva Delaney.

A. Well, Eva was hurt so bad and sore about it after I loosed her that she cried, and I wouldn't allow her out of the shop until she dried up her tears.

Q. You heard that girl say that you had talked to her about this Delaney girl. What do you say to that?

The COURT.—What was the name, Delaney?

A. Yes.

The COURT.—Cassidy was the name, I thought.

Mr. ROTH.—No Eva Delaney. [86]

WITNESS.—Eva Delaney. Those were the two that had the fight.

Mr. PRATT.—You heard her tell that you had talked with Grace when Eva Delaney wasn't around, I suppose to the effect that there was something the matter with Eva Delaney, that she was not a nice girl.

A. Eva Delaney is as nice a little girl as there is in Fairbanks. I have got nothing to say against Eva

(Testimony of J. P. Rose.)

Delaney in any way.

Q. The point is, did you say anything to this Carey girl, Grace Carey, that she was not a good girl?

A. No.

Q. Never at any time? A. No. No.

Q. Mr. Rose, was there anything that happened there with another girl? A. Yes.

Q. Who was that?

A. I forget the girl's last name, Cleora. I saw you write it down this morning. She came in with Whitely's baby in a carriage. I forget just exactly what was the matter with the buggy, and I sat the chair around just like this, and I says: "I have got to pull that wheel off, and you will have to hold the buggy or take the baby out." She says; "I would rather hold the buggy." And she sat down on the chair and held the buggy, and I took the wheel off and took it up to the vise and whatever was to do to it, I repaired it, and just as I slipped it on—well, Grace came while I was working at the vise, and I [87] heard her say; "What are you doing with that baby? That is my baby to take care of." And Cleora told her that she was going to take care of it this afternoon. And I went back, and, in order to put the wheel on and put the nut on, I got right down on my knee, and so the buggy wouldn't slip I held it, and Grace grabbed her by the hair and turned her right over backwards; then she ran away.

Q. What did you do after she jumped on your foot at that time?

A. I ordered her right out then, and she stayed

(Testimony of J. P. Rose.)

away probably three or four days.

Q. You told me about her running away. Was that the time she pulled the girl over?

A. Yes. I scolded her pretty strong when she done that, but I didn't get at her until she came back again, and I told her I wanted her to be more civil with other little girls there.

Q. Mr. Rose, did you have occasion to reprimand that girl many times, or a few times, or what?

A. Oh, I have spoken to her at different times that it was a shame, and compared her, and told her what she was, compared to her older sister, and told her how nice her older sister was.

Q. Her older sister? A. Yes.

Q. Did you know her older sisters?

A. Just a speaking acquaintance.

Q. The one they call Eva? [88]

A. Yes, Eva Carey, just a speaking acquaintance is all. She has been there a time or two. She sent her skates down there and got them sharpened, and Grace she was going to bring me back the money, but the money has not been brought back.

Q. Now, then, your regard for Grace as compared to the other girls was what? What do you say about that?

A. Well, I can't say that I ever liked Grace at all. I always treated Grace with just as much courtesy as I could, and under the circumstances didn't care to be rough or harsh with any girl. I think they—I think all the girls in Fairbanks will back me up in that, and the boys, too.

(Testimony of J. P. Rose.)

Q. Mr. Rose, you heard that girl, Grace Carey, tell about coming in there on two occasions. It must have been the latter part of June and along about the 4th of July, 1913, and that you had sexual intercourse with her back there on your bed. What do you say to this jury about that?

A. I say it is absolutely false.

Q. Did you ever have any conversation with her on that subject?

A. I would never allow her to approach me on that subject.

Q. Did she ever try to?

A. No. I always considered I was out of trouble.

Q. Did the girl ever introduce that subject around you?

A. I would never allow her at all. I have seen some very bold actions she has made around there, her and the Herrington girl both.

Q. So, her testimony with regard to your having intercourse with her on that bed is a falsehood?
[89]

A. It is absolutely false. I had been laying on the bed different times; she told the jury there that she had come in there. She said she would stand three or four feet from the bed. That is a fact. That is a fact that she always stayed her distance, and I never invited her to come any closer at all.

Q. Mr. Rose, you were a witness before the Grand Jury in the Wooldridge case, were you not?

A. I was.

Q. And afterward, you were a witness in this

(Testimony of J. P. Rose.)

case for the Government— A. I was.

Q. In the Wooldridge case. A. I was.

Q. You were called by the Government both times, were you not? A. Yes, sir.

Q. Do you remember the date that you were on the stand in the District Court here?

A. I believe it was on the 9th of March.

Q. Ninth of March? A. I believe that was it.

Q. You had been before the Grand Jury in the Wooldridge case along the 16th, 17th or 18th of February, hadn't you?

A. It was some time before. I wouldn't say the date at all.

Q. Eight or ten days before, wasn't it?

A. Yes. Some time before.

Mr. ROTH.—It was the 17th day of February.

Mr. PRATT.—March?

Mr. ROTH.—That Rose was before the Grand Jury on the 17th day of February. [90]

Mr. PRATT.—All right. Mr. Rose, after you had been a witness before the Grand Jury in the Wooldridge case— A. Yes.

Q. —on or about the 17th of February, and before you went on the stand as a witness for the Government in the Wooldridge case on the 9th of March, did you know that this indictment had been found by the Grand Jury against you?

A. Well, I had heard a good deal about it, but I had nothing sure about it.

Q. After the delivery of your testimony, isn't it

(Testimony of J. P. Rose.)

true that Mr. Roth was much put out and angry at you?

A. He spoke pretty short to me when I asked him if he was through with me.

Q. What did he say?

A. You needn't call for me any more—you needn't to report to me any more.

Q. Since that—(Interrupted)

A. I have not—(Interrupted)

Q. —he has filed a complaint against you charging you with perjury in that case, has he not?

A. He has.

Mr. PRATT.—Cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. The reason—No. The complaint that was filed against you, that you were speaking of, by myself charged you with perjury on account, as alleged in that complaint, that you gave false testimony at the trial of the Wooldridge [91] case here. Isn't that what is alleged in the complaint?

A. I believe so.

Q. Yes. Isn't it true that while on the witness-stand here in the Wooldridge case that you did swear differently than you swore before the Grand Jury?

A. No.

Q. That is not true?

A. No. Not to my best recollection.

Q. Isn't it true that what you swore to here on the witness-stand upon the subject of what you

(Testimony of J. P. Rose.)

heard Mr. Wooldridge say in your shop was contrary to a sworn affidavit that you made within an hour of the time that the conversation with Wooldridge occurred?

A. I find both words there on that. I did not read the thing myself. I find just what I said before the Grand Jury, and here "I was led to believe that he would," and how that word got in there, "He told me that he wanted to," it is a blank in my mind. It is a blank in my mind.

Q. Is that your signature, Mr. Rose? (Hands paper to witness.) A. It is. It is, sir.

Q. Didn't you make that signature to this paper within an hour of the time that the very conversation took place that is referred to in this paper?

A. In that neighborhood.

Q. All right. Isn't it true that this was read over to you after it was made up, by Frank Hall?

A. It was.

Q. Isn't it true that it was written down by J. H. Miller, the Chief Deputy Marshal, at your dictation?

A. It was. [92]

Q. Isn't it true that you told Mr. Miller, Mr. J. H. Miller, at the time that this statement of yours which you signed, which is marked Plaintiff's Exhibit Number 1 in the United States vs. Wooldridge, that you dictated to Mr. J. H. Miller the following:

Mr. PRATT.—May it please the Court, this is not cross-examination. I didn't go into any details about that. Now, if he does, we have got to try two cases here; but we are satisfied entirely to do that

(Testimony of J. P. Rose.)

if the Government wants to.

Mr. ROTH.—Then, what are you objecting for?

Mr. PRATT.—I say it is not cross-examination. You have a right to ask him if there was a discrepancy between that statement and his testimony before the Grand Jury, but he will explain that, he being sweated down there, and he wasn't doing the writing.

Mr. ROTH.—That is what you say, but I say he was not sweated.

Mr. PRATT.—Five deputies standing over him.

Mr. ROTH.—That is what you say, but you are not under oath.

Mr. PRATT.—He will say so in a minute.

The COURT.—You may proceed.

Mr. ROTH.—Q. Isn't it true that you dictated to Mr. J. H. Miller, at the time that you gave this statement, the following: (reads) "Wooldridge asked me about Laura while I was lying on the bed, and said he wanted to screw her, or words that gave me to understand that he wanted to have sexual intercourse with her." Isn't it true that you dictated that to J. H. Miller? [93]

A. Not just in them words, I don't think. Don't that read: "I was led to believe such"? That is the way that I read.

Q. Here is the way it reads. I read it to you.

A. That is the way, did it read: "I was led to believe"?

Q. (Reading) "Wooldridge asked me about Laura while I was lying on the bed and said he wanted to

(Testimony of J. P. Rose.)

screw her, or words that gave me to understand that he wanted to have sexual intercourse with her.” Now, did you dictate that to J. H. Miller there within an hour of the time that you had the conversation, or did you not?

A. I will say that that ought to read: To the best of my knowledge I was led to believe that he would do that. But he never told me, as I said here on the stand, that he wanted to screw her, as that thing said.

Q. And didn't you testify here in the Wooldridge case positively that never, at any time, at that time or any other time, did Wooldridge ever suggest or intimate to you that he wanted to have sexual intercourse with Laura Herrington? Didn't you so testify when you were a witness on the stand here in the Wooldridge case?

A. I think I testified that he never told me that he wanted to. I think that is to the best of my knowledge.

(Here the Court takes a short recess until 3:10 to-day and the jury withdraws from the courtroom after being admonished as usual by the Court; and, subsequently return into Court, when the defendant and his attorney and the district attorney are present and the trial is resumed.)

(Mr. Pratt asks and is granted permission to ask a question of the witness, on direct examination.)

Q. You heard the testimony of those girls about some conversation you had with them before the Grand Jury met, about the time the Grand Jury

(Testimony of J. P. Rose.)

met this year. A. Yes. [94]

Q. Grace Carey and Laura Herrington.

A. Yes, sir.

Q. State to the jury what that was.

A. Why, they came in there one evening and I says: "Well, are they going to get you before the Grand Jury this time?" And Grace says, "What can they get us up for?" or "What can they do?" I believe. And I says: "I guess they can't do anything. But you want to straighten up and be little ladies and then they won't try to do anything." Just exactly the words. They wasn't in there over two minutes. When I said that, they left. They didn't ask me for anything, or anything of that kind.

Mr. PRATT.—That is all.

Cross-examination (Resumed).

Mr. ROTH.—If the Court please, I desire to introduce in evidence that portion of this document which is marked Plaintiff's Exhibit Number 1 in the case of the United States against Wooldridge, which I asked this witness about.

Mr. PRATT.—It has been read to the jury twice. That is the part, isn't it?

Mr. ROTH.—Yes. Very well, with that understanding.

Mr. PRATT.—If it goes in at all, the whole statement will have to go in.

Mr. ROTH.—Q. At the time that you testified in the case of the United States against Wooldridge in this court, did you not, on your direct examination, testify as follows:

(Testimony of J. P. Rose.)

“Question, by Mr. Roth. When you were lying on the couch there, did Wooldridge say anything about Laura Herrington? [95]

Answer. I believe that while I was lying on the couch there that he told me about that sack of potatoes, and what the conversation drifted to I wouldn't be positive what it did go to.

Mr. ROTH.—That is not an answer to the question at all, if the Court please.

The COURT.—Answer the question, Mr. Rose.

Answer. Well, I don't remember that he did.

Mr. ROTH.—Was there anything said while you were lying there on the bunk, between you and Mr. Wooldridge at that time, about the Grand Jury being *is* session?”

Mr. PRATT.—What is all this about?

Mr. ROTH.—That last question I withdraw.

Q. Referring to the same question which I read before: (Reads.)

“When you were lying on the couch there, did Wooldridge say anything about Laura Herrington?

Answer. There is a part of that question which I did answer, but the ‘sexual intercourse’ I did not.”

No, that is not it. Here is another question. In response to the following question, did not you testify as follows, while you were on the witness-stand

(Testimony of J. P. Rose.)

here as a witness in the case of the United States against Wooldridge: (Reads.)

“Didn’t you, before the Grand Jury under oath”—this is a question—“while it was in session here, testify that while you were lying on the couch in your office the evening that Laura Herrington came there that—in substance as follows: Wooldridge asked me about Laura while I was lying on the bed and said he wanted to, or gave you to understand that he wanted to have sexual intercourse with Laura, and you answered and said, ‘I wouldn’t have anything to do with her until after the Grand Jury get through; that the Grand Jury would get hold of a thing of that kind and would investigate it and that you said, ‘It wouldn’t be safe,’ and you further said, ‘In order to get at that, they would take her up to Roth’s office, then they would take her to one of the assistants, then back down to the Grand Jury-room again, and they would sweat her until she would have to tell it.’ Did you so testify before the Grand Jury? [96]

Answer. There is a part of that question which I did answer, but the ‘sexual intercourse’ I did not. I said to the Grand Jury about taking her to the Grand Jury and back again; but Wooldridge never said to me that he intended to have intercourse, or would have it.”

Did you so testify when you were on the witness-stand here before? A. I did.

(Testimony of J. P. Rose.)

Q. Did you further testify when you were on the witness-stand here upon cross-examination, in response to questions that were propounded by Mr. Marquam, testify as follows, to wit: (Reads.)

“Are the answers that you gave to those questions he might have asked you written down here? Are these the answers?” referring to this written statement you have identified.

Answer. I see one place there that I didn't know that was on that paper. I don't think that I ever said that Wooldridge wanted to have sexual intercourse with Laura Herrington.

Question. No matter what you said at that time and under those circumstances. What is the fact and what is the truth; did he ever tell you that?

Answer. Never in his life.

Question. Never in his life?

Did you so testify? A. I did.

Answer. Never in his life, as I remember.”

Q. At the same time, while you were such witness, in response to questions propounded by Mr. Marquam upon cross-examination, I will ask you to state if you testified as follows, to wit: (Reads.)

“Question. What I mean to say, Mr. Rose, was there anything said by Mr. Wooldridge about his wanting to or intending to or trying to have anything to do with this girl Laura Herrington that led you to make that remark?

Answer. No. No. No.

Question. Nothing?

(Testimony of J. P. Rose.)

Answer. No. Not in my best recollection at all.

Question. Are you willing to say positively to this jury now that there was nothing said by Mr. Wooldridge [97] that caused you to make that remark as applying it to him?

Answer: I don't think that Wooldridge made any such remarks or banters to me whatever, to the best of my knowledge, that he wanted to do anything in my place at all.

Question: You are satisfied of that?

Answer: I am."

Did you so testify?

A. I did.

Mr. ROTH.—That is all.

Redirect Examination.

(By Mr. PRATT.)

Q. Mr. Rose, where were you when you signed that paper?

A. In the Marshal's office; the private office of the Marshal's office.

Q. Who all was in there with you?

A. There were about five, I guess.

Q. Can you name them?

A. Miller, Wood, McMullen and Frank Hall.

Q. Who else? J. H. Miller?

A. J. H. Miller. I said Miller, Wood.

Q. Two—Hall? A. Hall.

Q. Hall—three. A. McMullen.

Q. McMullen—four. A. And Berg.

(Testimony of J. P. Rose.)

Q. Who else? And Berg. They were all there.

A. And me.

Q. Miller is the Chief Deputy, isn't he?

A. I believe so.

Q. He asked you to make a statement about the occurrences [98] that happened in your shop that evening.

A. He did.

Q. And you were willing to do it.

A. I did.

Q. Now, Mr. Roth has asked you, put questions to you as though you asked or expected somebody to take it down; that you had dictated to him on that point.

A. They sent down to the shop for me.

Q. What about dictating that statement?

A. They got the paper and sat down and asked me if I would not give them a statement.

Q. Did you ask them to write down what you said?

A. I did not.

Q. They did that themselves.

A. They done that all themselves.

Q. And they asked you a great many questions, I suppose.

A. Yes.

Q. Eh?

A. Yes, a great many.

Q. After one part of that statement was signed, they got you to make another one and you signed that, did you?

A. How is that?

Q. After you had made a statement and it was written down and you signed it; then they wrote ahead again and you signed it again?

A. I only signed once, I believe.

Q. You signed it twice.

(Testimony of J. P. Rose.)

Mr. ROTH.—No. He didn't sign it twice.

Mr. PRATT.—You don't know what happened there yourself.

WITNESS.—Why, I didn't read it. That is sure.
[99]

Mr. PRATT.—I am talking to Roth; not to you.

Q. Ain't that your signature there on the first page? A. Yes.

Q. That is on one page. Ain't that your signature again? A. Yes.

Q. They wrote some more after that one pass at it. Now, Mr. Rose, did you read this paper that night? A. No, sir.

Q. Why didn't you?

A. I didn't have any glasses. I couldn't see it.

Q. When you were taken in there to that room to be interrogated, who, if anybody, had been in there before you to be sweated or interrogated?

A. Wooldridge.

Q. Wooldridge, he came out and he went his way.

A. We were all in there together the first time, and I went home, and they came back after me.

Q. When you made your statement, was Wooldridge there?

A. Nobody there but just the marshals and me.

Q. Those men. Well, what was done towards informing you as to what was in this paper?

A. Where? In the Marshal's office?

Q. Yes.

A. Well, they got a paper and wrote down—(Interrupted)

(Testimony of J. P. Rose.)

Q. But what was done to communicate to you what was in this paper, anything, anybody read it?

A. Oh, yes. Frank Hall read it.

Q. Frank Hall read it. Now, this language has been quoted: (Reads.) [100]

“Wooldridge asked me about Laura while I was lying on the bed and said he wanted to screw her, or words that gave me to understand that he wanted to have sexual intercourse with her.”

Q. Now, Mr. Rose, did you use any such language as that? A. I don't think so.

Q. You don't think so? A. No. No.

Q. What about that word “screw”?

A. Well, it is a word I hardly ever use. I didn't know that I ever used it.

Q. Did he say anything of that kind, of that same meaning to you there that night?

A. I don't think so. I remember the question. I don't know whether he said—asked me if he wanted to screw her. I told him, in answer to the question; I was led to believe he would do that.

Q. That is what you said?

Q. That is what ought to be on that paper.

Q. That is what you said down in the Marshal's office?

A. That is what I said down in the Marshal's office.

Q. That is what you said before the Grand Jury.

A. That is what I said before the Grand Jury.

Q. What was your information now that caused you to think so?

(Testimony of J. P. Rose.)

A. Taking into consideration the weakness of men among women.

Q. Had he ever said anything—(Interrupted)

A. No.

Q. —or done anything that would make you have a right to believe that he would have intercourse with Laura Herrington?

A. No. We talked very much about these girls racing around the streets, and so on. [101]

Q. He had known the girls from childhood.

A. He knowed them, yes, long before I did, I guess.

Q. That is what you had in mind, was it?

A. Yes.

Q. It was not that he said—

A. Not that he said. No.

Q. You heard Mr. Berg's testimony in the Commissioner's Court? A. Yes.

Q. What did he say you said?

A. When you pinned him down if he didn't say so and so, that he was led to believe that, he said that in substance that was about what it was.

Q. He said he was sitting in a hallway there, peeking through a little crack looking at Wooldridge and you. A. Yes.

Q. In your back room. A. Yes.

Q. About six or eight feet away from you. Didn't he say that? A. Yes.

Q. And that he couldn't hear but only a part of the language used. A. Yes, sir.

Q. And that as far as he knew you might have said

(Testimony of J. P. Rose.)

that up here in the Marshal's office when you were talking there.

Mr. ROTH.—That is objected to—

Mr. PRATT.—Q. That you might have said that you was led to believe that he wanted to.

Mr. ROTH.—We object—

A. Yes. [102]

Mr. PRATT.—That is all.

Recross-examination.

(By Mr. ROTH.)

Q. As I understand you, Mr. Rose, you deny that you told Mr. Miller, at the time that this statement was written down, that Wooldridge had asked you about Laura while you were lying on the bed and said that he wanted to screw her, or words that gave you to understand that he wanted to have sexual intercourse with her. You deny making that statement to Joe Miller there in the presence of those persons that were named.

A. I don't have any recollection of that being in there at all.

Q. But you deny making that statement, do you?

A. That statement—it is as near a denial of it as I can make, and be honest.

Q. Do you deny that Frank Hall read that to you; that Frank Hall read that language to you when he read it?

A. If he read it I didn't understand it that way.

Q. Do you deny that he read it to you?

A. He read the paper, whether he read it all or not.

(Testimony of J. P. Rose.)

Q. Do you wish to be understood as swearing that you didn't hear him read that part of it to you?

A. The part that is there that Wooldridge told me that he wanted to screw her, I deny making that statement.

Q. And you deny Frank Hall read that part of it to you when he read it.

A. I deny hearing Frank Hall mention that when he read that paper.

Q. You would not have signed it if he had read that. A. What? [103]

Q. You would not have signed it if he had read that? A. No, sir; I wouldn't.

Mr. ROTH.—That is all.

Mr. PRATT.—That is all.

Stipulation Re Filing of Indictment.

(Stipulated between attorneys for plaintiff and defendant that the indictment in the Wooldridge case was returned on the 18th day of February, and was filed on the 19th day of February; and further stipulated that the indictment in this case against J. P. Rose was filed March 2d; that the bench warrant is dated the 27th day of March, and was served on the 27th day of March; and that Mr. J. P. Rose testified in the case of United States vs. Wooldridge on March 9th.)

Testimony of J. J. Patton, for Defendant.

J. J. PATTON, a witness for defendant, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. PRATT.)

Q. State your name, age, and place of residence, to the jury.

A. My name is J. J. Patton; residence Seventh and Barnette street; and within two days of 43 years of age.

Q. You are the pastor here of the Methodist Episcopal Church, are you not? A. I am.

Q. How long have you lived in this community?

A. About two and a half years.

Q. During that time have you known a girl by the name of Grace Carey? A. I have.

Q. Do you know her when you see her? A. I do.

Q. Do you know what her general moral character is as made up from general reputation on that subject? [104]

(Plaintiff objects as irrelevant, incompetent and immaterial. Jury withdraws, pending argument, in charge of bailiffs, after receiving the usual admonitions. After argument, the jury return into Court.)

The COURT.—Objection sustained.

(Defendant excepts, and is allowed an exception.)

Mr. PRATT.—That is all, Mr. Patton.

(Trial continued until 10 A. M. to-morrow morning, and the jury withdraw in charge of the bailiffs, after receiving the usual admonitions. And, at

10 A. M. April 4, 1916, the defendant and his attorney and the district attorney and the jury are present, and the trial proceeds.)

Testimony of Andrew Anderson, for Defendant.

ANDREW ANDERSON, a witness for defendant, after being duly sworn, testified as follows, to wit:

Direct Examination.

(Mr PRATT.)

Q. Mr. Anderson, you reside here in Fairbanks?

A. I do.

Q. How long have you lived here?

A. It will be eight years the 5th of July, the coming July.

Q. What line of business have you followed?

A. Laundry business.

Q. Still in that business, are you? A. Yes.

Q. Do you know J. P. Rose, the defendant?

A. I do.

Q. How long have you known him?

A. For a number of years.

Q. Where is your place of business with reference to his, where he is now located?

A. His business is between First and Second Avenues on [105] Lacey Street, and our business is on the corner of Second Avenue and Lacey Street.

Q. Very far away from him?

A. Something like about two hundred feet.

Q. Have you had occasion to be in his shop, or by his shop, frequently or otherwise?

A. A number of times.

(Testimony of Andrew Anderson.)

Q. Been in his shop? A. A number of times.

Q. Have you had occasion to notice the fact that boys and girls and women are in that shop frequently in the matter of getting repairs for skates, bicycles, sewing-machines, and such as that?

(Objected to by plaintiff. Objection overruled.)

A. I have seen boys and men there, but I never saw any women there that I recollect.

Q. Girls, young girls?

A. I never saw any girls there.

Q. You never noticed any there?

A. I never noticed any girls.

Q. Mr. Anderson, do you know—I believe you said you have known Mr. Rose all the time you have lived here. A. About six years.

Q. I will ask you if you know, first—that can be answered by yes or no—if you know what his general reputation in this community is for chastity?

(Plaintiff objects as irrelevant, incompetent and immaterial, and after argument withdraws the objection.)

A. It is good. [106]

Q. The first question is: Do you know?

The COURT.—Do you know what his reputation is? Answer the question by yes or no.

A. I do.

Mr. PRATT.—Q. What is that reputation—good or bad?

A. It is good always. I know him to be—always to be good.

Mr. PRATT.—You may cross-examine the witness.

(Testimony of Andrew Anderson.)

Cross-examination.

(By Mr. ROTH.)

Q. When did you first find out that Mr. Rose's reputation for chastity was good?

A. I never know anything else.

Q. When did you first find out that it was good? You say now that it is good positively. When did you first learn that his reputation for chastity was good?

A. I don't know how to answer you that. I always know him to be a good man, in good standing in the community.

Q. We are not talking about that. You understand that your answer is directed to the question of chastity. You know what chastity means, do you? What does chastity mean?

A. I can't find a word for it.

Q. What do you think it means?

A. It means good morals.

Q. In what particular? A. In any line.

Q. In any line? A. Yes.

Q. That is your understanding of chastity?

A. Yes. [107]

Q. A man, according to that, may be a first-class man, morally, in your opinion, and once in a while have sexual intercourse with a woman that is not his wife. A. I don't think so.

Q. That wouldn't necessarily take away his chastity from him, would it? A. I think it would.

Q. Oh, you think it would? A. Yes.

Q. Well, if a man stole some money, would that

(Testimony of Andrew Anderson.)

take away his chastity? A. Why, certainly.

Q. That is your understanding now of the word "chastity"? A. Yes.

Q. If he had stolen money it would take it away from him quicker than if he, once in a while, had sexual intercourse with a woman that was not his wife, would it? In your opinion, if he is an unmarried man who had sexual intercourse with a woman, why it wouldn't take his chastity away as quickly as if he stole money, would it?

A. I think it would. Q. You think it would?

A. Yes.

Q. You think they are both just the same in that respect? A. I do as far as I understand now.

Q. You are a Christian gentleman?

A. Yes, sir. I do—I am.

Q. You are a member of the Methodist Church here? A. I am. [108]

Q. One of the officers of the church? A. I am.

Q. Now, whoever told you that Mr. Rose was a chaste man?

A. I don't understand that, Mr. Roth.

Q. Whoever told you, or whoever did you hear say that Mr. Rose is a chaste man?

A. I can't answer that.

Q. You are very much opposed to these prosecutions, aren't you, in these rape cases?

A. I am not.

Q. Haven't you taken a positively active interest in it, yourself?

A. As far as any citizen would do, I was interested in it.

(Testimony of Andrew Anderson.)

Q. Haven't you in at least one of these cases contributed money for the defendant in one of these rape cases? A. I have.

Q. Haven't you been spending a lot of time—(Interrupted.) A. Some.

Q. —fighting these cases. Haven't you?

A. I don't consider it fighting them.

Q. Haven't you stated publicly in the restaurants in this town, or at least at one time in a restaurant in this town, that these prosecutions were being made on account of bitterness of the Marshal's office and the District Attorney's office, and that these prosecutions were a job?

A. I don't remember I have done that.

Q. Didn't you, in the presence of Axel Carlstein and Edward Morrissey, down here in the Arcade Restaurant one morning at breakfast, at the lunch counter, state that these prosecutions were being brought about on account of spite [109] and malice by the Marshal's office and the District Attorney's office; didn't you say that?

A. There was a number of fellows—(Interrupted.)

Q. Answer that question yes or no. Did you or did you not state that?

A. I probably agreed to it.

Q. Didn't you state what I am telling you?

A. I might have agreed to it.

Q. But did you not yourself state that these prosecutions were a job?

A. I might have done it. I don't know. I don't remember.

Mr. ROTH.—That is all.

Mr. PRATT.—That is all.

Testimony of William H. McPhee, for Defendant.

WILLIAM H. MCPHEE, a witness for defendant, testified as follows, to wit:

Direct Examination.

(By Mr. PRATT.)

Q. Mr. McPhee—

A. Speak louder, Judge, because I can't hear unless you do.

Q. You live here in Fairbanks? A. Yes, sir.

Q. How long have you lived here?

A. About eleven years, I think.

Q. Do you know Mr. Rose sitting here?

A. I have.

Q. Does he rent a shop from you?

A. Yes, sir.

Q. In the Washington Block? How long has he been a tenant [110] there in that building, the Washington Block?

A. I couldn't say exactly. Something between three and four years.

Q. Have you known him well during that time?

A. I have seen him most every day in that time.

Q. Have you been in his shop frequently?

A. Lots of times.

Q. And by there? A. Lots of times.

Q. Have you noticed the kind of customers he has there, whether they are boys and girls and women or not?

(Testimony of William H. McPhee.)

A. Boys, girls, women and men. I have seen them all there.

Q. You have been in there when they have been in there, the boys and girls and women?

A. Hundreds of times.

Q. You have had occasion then to notice his deportment and dealings with girls and women, have you?

A. I have seen him many's the time helping little girls to start off riding on their bicycles, and I never saw anything but what was proper and right of any kind.

Q. Mr. McPhee, do you know what Mr. Rose's general reputation in this community is as to being a chaste man, that is, a man who deals kindly and respectfully with girls and women?

(Plaintiff objects as irrelevant, incompetent and immaterial; that the interpretation that he puts upon the word "chastity" is not a proper meaning or definition of the word. Objection sustained.)

Q. Do you know what his general reputation in this community [111] is as to chastity?

A. It has been good. I never heard a word said against the man in any way until this scrape came up.

Mr. PRATT.—You may cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. Mr. McPhee, do you understand the question that was asked you? A. Yes, sir.

Q. That his reputation is good for chastity?

(Testimony of William H. McPhee.)

A. Well, good in a business way.

Q. No, no, no. That was not the question. The question was chastity.

A. I don't know as I know the meaning of the word chastity.

Q. Don't you know the meaning of chastity?

A. I don't believe I do, to give it a definition.

Q. You answered it here and your answer is of record. You answered a question then that you don't know anything about.

A. Well, probably you can take it that way.

Q. Well, chastity means virtuous on the ground of having sexual intercourse with women.

A. What the devil do I know about that.

Q. You don't know what his reputation about having sexual intercourse with women is?

A. I don't know nothing about that at all.

Mr. ROTH.—That is all. [112]

Redirect Examination.

(By Mr. PRATT.)

Q. Did you ever hear him criticised or discussed?

(Plaintiff objects as irrelevant, incompetent and immaterial.)

The COURT.—Mr. Pratt, when a witness says he doesn't know what chastity is, or "what the devil does he know about it," I do not think any further questions on that proposition are necessary.

Mr. PRATT.—That is all.

Testimony of F. Bishoprick, for Defendant.

F. BISHOPRICK, a witness for defendant, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. PRATT.)

Q. You live here in town? A. I do.

Q. You are a merchant here, are you?

A. Yes, sir.

Q. How long have you been in that line of business here in town? A. About five years.

Q. Where has your place of business been located with reference to Mr. Rose's shop?

A. I have been located in the McPhee building and in that neighborhood.

Q. Do you know Mr. Rose? A. Yes.

Q. Do you know where his place of business is?

A. I do. [113]

Q. Do you pass there frequently?

A. Quite so. Yes.

Q. Pretty much every day, don't you?

A. Every day.

Q. Have you noticed the class of customers that he has, that is, whether young people, girls and boys and women? A. Yes.

Q. Have you noticed them there? A. Yes.

Q. Have you been in there frequently?

A. Yes.

Q. Now, Mr. Bishoprick, you understand the meaning of the word chastity, don't you?

A. I do.

(Testimony of F. Bishoprick.)

Q. Do you know what his general reputation for chastity is in this community?

A. I never heard anything against it.

The COURT.—The question is: Do you know. You can answer that by yes or no, Mr. Bishoprick.

Mr. PRATT.—Q. Do you know?

A. Well, I—Yes.

Q. What is that reputation, good or bad?

A. It is good, as far as I know.

Mr. PRATT.—Cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. You never heard anything, one way or the other, about Mr. Rose's chastity, did you, one way or the other? A. I never did.

Mr. ROTH.—That is all. [114]

Testimony of Thomas Kiel, for Defendant.

THOMAS KIEL, a witness for defendant, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. PRATT.)

Q. Mr. Kiel, you live here in Fairbanks?

A. Yes, sir.

Q. You are engaged in the tent and awning business, are you not? A. Yes, sir.

Q. How long have you been in that line of business here in Fairbanks?

A. Fairbanks, I have been here since 1908.

Q. Have you known Mr. Rose since that date?

A. Not quite since that date, but about a year later.

(Testimony of Thomas Kiel.)

Q. You have known him all the time since?

A. Yes, sir.

Q. Where has your place of business been with reference to his place of business for the last three or four years, that is, since he has had his shop in the Washington Building?

A. The first two years, his door was within about four or five feet of mine, his back door within about four or five feet of my door; since then he has been across the street from me.

Q. You are now in the Vachon Building.

A. Yes, sir.

Q. Have you had occasion, during the last three or four years, to know the kind of customers that he has there, that is, whether they were boys, young people, boys, girls and women? [115]

A. Yes, sir.

Q. As well as men? A. Yes, sir.

Q. You noticed all of them? A. Yes, sir.

Q. You have been in there frequently?

A. Very frequently.

Q. Have you noticed his treatment and demeanor toward women? A. I have.

Q. And girls? A. I have.

Q. Now, Mr. Kiel, you know the meaning of the word chastity, don't you? A. Well, I do. Yes.

Q. Do you know what Mr. Rose's general reputation in this community is with reference to chastity?

A. Yes, sir.

Q. What is that reputation; good or bad?

A. It is good.

(Testimony of Thomas Kiel.)

Mr. PRATT.—Cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. What is Mr. Rose's business?

A. He repairs bicycles, sewing machines, etc., guns, phonographs.

Q. You have seen a great many young girls at his shop, haven't you? A. I have.

Q. Every day? A. Every day. Lots of them.

Q. What were they doing there? [116]

A. Most of them came there with bicycles to be repaired and other little odd jobs, sent there by their parents, I presume.

Q. Lots of them go there without anything to do too, don't they? A. That I couldn't tell you.

Q. You have been in that shop?

A. I have been in that shop lots of times.

Q. And seen little girls come in there without any business?

A. Seen them around there, usually with bicycles or something of that kind.

Q. You have seen them come in without any business? A. That I couldn't tell you.

Q. You can't tell that? A. I cannot.

Q. Now think. A. I can't tell you.

Q. That has been a kind of headquarters for children? A. I presume it is, boys and girls.

Q. Yes. Boys and girls, and girls without boys, and boys without girls? A. Yes.

Q. You have seen girls in there alone?

A. Lots of times.

(Testimony of Thomas Kiel.)

Q. Without any apparent business?

A. Whether they were on business or not, I don't know.

Q. They were very familiar around there, were not they?

A. I have seen lots of kids playing around there.

Q. How do you know his reputation for chastity is good?

A. Because I never heard it criticised in any way, and I know [117] the man pretty well, myself.

Q. Do you think that your knowledge of the man would be such that you would know that he wouldn't have sexual intercourse with a woman?

A. I couldn't tell you that. Of course, I suppose it is natural for a man to have sexual intercourse with a woman, but I don't think—my knowledge is such of Mr. Rose that I don't think he would do it illegally.

Q. You know he is not married? A. I do.

Q. All right. Then you believe that he does have sexual intercourse? A. I can't say.

Q. You say you would naturally suppose that his human nature would call for that?

A. I said, naturally I supposed it would, but whether it would or not I am not prepared to say.

Q. Why do you swear here that his reputation for chastity is good, and you say you know the meaning of the word "chastity"?

A. Because I never heard anyone criticise his reputation.

Q. Don't you know that if he would go down and

(Testimony of Thomas Kiel.)

have sexual intercourse with a prostitute on the "Row" that he would be unchaste?

A. I presume he would.

Q. Now, you say your knowledge of him leads you to believe that he is chaste? A. Yes, sir.

Q. Then you don't believe that he does have sexual intercourse with anybody? [118]

A. I am not saying that I don't believe. I am stating as far as my knowledge goes.

Q. You say you know what his reputation is, and you speak from your knowledge of the man?

A. I am not supposed to know anything about his personal or private affairs, no more than this; I am speaking simply from what I know of Mr. Rose and what I have seen of him.

Q. Don't you know, Mr. Kiel, that it would be a remarkable thing if anybody knew whether or not a man was chaste? Don't you know that?

A. It probably would.

Q. Don't you know that when a man states under oath that he believes that a man is chaste, that he is kind of stretching the proposition a little bit?

A. Well, I don't think he is.

Q. Do you suppose that if a man is having sexual intercourse with a woman or with a child that he is going to tell you about it?

A. It is not very likely.

Q. Do you suppose he is going to tell anybody about it? A. It is not very likely he will.

Mr. ROTH.—That is all.

Mr. PRATT.—That is all.

Defendant rests. [119]

**Testimony of Frank B. Hall, for Plaintiff (In
Rebuttal).**

FRANK B. HALL, a witness for plaintiff in rebuttal, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. Mr. Hall, what was your official position on the 15th day of February, of this year?

A. Deputy United States Marshal.

Q. Did you hold any other official title?

A. That of Notary Public.

Q. I will show you a paper here, Mr. Hall, which is marked Plaintiff's Exhibit Number 1 in the case of the United States against Wooldridge, and ask you to state whether or not that is your signature attached to that as a notary.

(After a discussion, Mr. Pratt, for defendant, states as follows: "His (Mr. Roth's) questions to Mr. Rose were on a collateral matter, and he is bound by Rose's answers, and he cannot dispute him by testimony in rebuttal. That is the universal rule, and I object to this testimony on that ground." Objection overruled. Defendant excepts, and is allowed an exception.)

A. It is.

(Defendant moves to strike out the answer. Motion denied. Defendant excepts and is allowed an exception.)

Q. Mr. Hall, what is that paper?

A. That is a statement made by J. P. Rose, written

(Testimony of Frank B. Hall.)

down by Chief Deputy Marshal Miller, in the presence of Mr. Miller, Mr. Rose, deputy marshals McMullen, Wood, Berg and myself.

Q. Was it sworn to? A. It was. Yes, sir.

Q. Before whom?

(Defendant objects as irrelevant, incompetent and immaterial. Objection overruled.)

Q. Just tell this jury how that was written?
[120]

(Defendant objects.)

Q. Who dictated it and how it was written. Just exactly how it was written.

(Defendant objects.)

Q. Just state exactly how that paper was made.

(Defendant objects. Objection overruled.)

Q. Tell the jury exactly how that was made.

A. Mr. Rose told the statements that are written down here.

(Defendant objects, that that is not the question, and Mr. Roth states that it is, and the Court directs the witness to proceed with his statement.)

A. And as he spoke, Chief Deputy Marshal Miller wrote them down, and when he would get probably to the end of a paragraph, he would read it over again to Mr. Rose; then he would say, "Go on," and Mr. Rose would recite some more and Mr. Miller would take it down, and it is all in long hand—

Q. Yes?

A. —so it was written down carefully; and when the instrument was completed, Mr. Miller passed it to Mr. Rose and asked him to read it. Mr. Rose

(Testimony of Frank B. Hall.)

took the paper and then said he didn't have his glasses and couldn't read it. Then Mr. Miller passed it to me and said; "You read it to Mr. Rose," which I did; and, after I had read it to Mr. Rose, Mr. Rose said; "Yes, that is right. That is exactly what I want to say."

Q. Did you read everything that was in there to him? A. Positively everything.

Q. Now, I want to call your attention to one specific part of this—(Interrupted.)

The COURT.—I think I anticipate the question which you are going to ask. This witness is on the stand to show just exactly how that was written down, and not for the contents. [121]

Mr. PRATT.—I object to any further testimony.

Mr. ROTH.—Q. Did Mr. Rose at that time object or dispute any part of that statement as you read it to him?

(Defendant objects as irrelevant, incompetent and immaterial. Objection overruled.)

A. He did not.

Mr. ROTH.—That is all.

Mr. PRATT.—No questions. [122]

Testimony of J. H. Miller, for Plaintiff (In Rebuttal.)

J. H. MILLER, a witness for plaintiff in rebuttal, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What official position did you hold on the 15th

(Testimony of J. H. Miller.)

day of February, 1916?

A. Chief office deputy in the Marshal's office of the Fourth Division.

Q. Are you acquainted with the defendant, J. P. Rose? A. I am.

Q. Did you see him in the evening of the 15th day of February, 1916? A. I did.

Q. I will show you a paper which is marked Plaintiff's Exhibit 1 in the case of the United States against Wooldridge, and ask you to state if you know in whose handwriting that paper is?

A. That is in my handwriting, the body of it.

Q. Where did you do that writing?

A. In the Marshal's office.

Q. Tell this jury exactly how you wrote that document.

(Defendant objects as incompetent, irrelevant and immaterial, being upon an immaterial point, on another proposition entirely, something that plaintiff didn't inquire into of Mr. Rose, and that something that all he said concerning was in response to questions asked on cross-examination, and, being collateral, his answers are binding on the government. Objection overruled. Defendant excepts and exception allowed.)

A. You asked me how I came to write this.

Mr. ROTH.—Yes. How it was written.

The COURT.—Not how you came to write it, but how it was written. [123]

A. It was written with a lead pencil.

Mr. ROTH.—Q. All right. Did you get the mat-

(Testimony of J. H. Miller.)

ter out of your own head or where did you get the subject matter; how did you come to write that down?

A. Why, I came to write it down from a statement made by Mr. Rose.

Q. When was the statement made?

A. The statement was made in the evening of the 15th.

Q. Was that statement made any time before you wrote it down, or how did you come to write it?

A. I asked Mr. Rose for a statement of what transpired up there in his building, and, in answer to that, he made the statement which I wrote down here.

Q. Did he make it as you wrote it down?

A. As I wrote it down, and as I would write part of it, I would read it back to him and ask him if it was what he wanted to say, and he said it was; and he would make another statement, and I would write that down and read it back to him.

Q. All right.

A. Then I went on until I finished the whole thing; then I handed it to him and asked him to read it, and he said that he didn't have his glasses with him, and I handed the statement then to Frank Hall, who was present, and asked him to read it, and he read it to Mr. Rose.

Q. Did Frank Hall read everything that was in it?

A. I believe he did. He read the statement just as I handed it to him.

(Testimony of J. H. Miller.)

Q. What did Mr. Rose say about it, if anything?

A. Mr. Rose said that that was correct; that was what he wanted to say. And I asked him if he was willing to swear to it, [124] and he said he was, and I had Mr. Hall swear him to it.

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. PRATT.)

Q. Mr. Miller, you went down or sent down to his shop for him and fetched him up there? A. Yes.

Q. It was that night? A. Yes, sir.

Q. Nine or ten o'clock?

A. I don't know just the time Mr. Rose came. I think it was between eight-thirty and ten o'clock.

Q. You had had Mr. Wooldridge in and examined him before you sent for Rose?

A. I had them all in there together,—Mr. Rose, Wooldridge and the girl.

Q. Then Mr. Rose went home, back to his shop.

A. Yes. Before he went back to his shop he wanted to talk to me some, but I didn't have any talk with him at that time.

Q. Didn't he go back to his shop? A. Yes.

Q. You then proceeded to examine Wooldridge alone? A. No, sir.

Q. You didn't examine Wooldridge in the presence of Rose? A. I did.

Q. You did?

A. In the presence of Rose and Laura Herrington and some of the deputies.

(Testimony of J. H. Miller.)

Q. Then Rose went home. A. Yes. [125]

Q. Then you sent for him? A. I did.

Q. How long after that did you send for him?

A. Probably fifteen or twenty minutes.

Q. Now, before that, earlier in the evening, you and Berg and John C. Wood, you got into a hallway there next to his bedroom where his bed is, and cut a hole through the canvas—Berg did, at least, and he peeked through there, and you and Wood were listening. A. No, sir.

Q. And Berg said he was listening.

A. No. You are wrong. I wasn't there at all at that time.

Q. You were not there during that time?

A. I was there during the afternoon, but not in the evening. It was just Wood and Berg that were present there in the evening.

Q. They were there in the evening. A. Yes.

Q. They had gum shoes?

A. They had rubbers, I suppose.

Q. They had gum shoes?

A. Why, we all had rubber shoes on.

Q. You all three had gum shoes on.

A. Yes, sir.

Q. A very thin partition between where you and Wooldridge and Rose were talking?

A. I wasn't there at that time.

Q. Now then, when you sent for Rose after you had dismissed Wooldridge, and got him up there, he was somewhat agitated, wasn't he? [126]

A. No, sir.

(Testimony of J. H. Miller.)

Q. He wasn't? There were five of you there.

A. I don't remember just how many, three or four or five.

Q. In there by yourselves? A. Yes, sir.

Q. All deputy marshals?

A. Yes, sir, except Mr. Rose.

Q. Then you asked him to make a statement.

A. I did.

Q. About what transpired that evening in his shop as between him and Wooldridge?

A. Yes, sir.

Q. And he was willing to make it? A. He was.

Q. And you did the writing? A. I did.

Q. And after you had written everything that he said, he signed it? A. Yes, sir.

Q. He only signed it once, did he?

A. I am not sure whether he signed both pages, or signed one, at the end. I don't know without looking.

Q. Look and see if you didn't write one page and he signed that, and then you wrote another page—
(Interrupted.)

A. I think I had him sign both pages. (Examines said paper.) Yes. Both pages are signed.

Q. But on different subjects—the matters on both pages?

A. I don't know. It was the whole subject on pages that were not attached. A signature on one page wouldn't mean anything [127] as to the other.

Q. When you got the first page written, didn't

(Testimony of J. H. Miller.)

you hand the statement to him and have him sign it?

A. No. There was not any signing done until after the whole thing was finished.

Q. Didn't he sign the first page after you had written that first page? A. No, sir.

Q. Didn't Berg interrupt during the time he was making the statement and say; "Now, Rose. You are lying. You are lying." A. No.

Q. Didn't that happen a couple of times?

A. It did not.

Q. It didn't? A. No, sir.

Q. Now, you know there are two statements, two clauses in that; one very plain, and the other modifying it a great deal, upon the subject of what Wooldridge told Rose. You know that. You can see that by looking at it.

A. I don't know just the wording of it, now.

Q. There is one clause that is very plain; that Wooldridge told him that he wanted to do so and so to that girl? A. Yes.

Q. And the other is; "That he gave me to understand."

A. It was just as Mr. Rose stated it, whatever it was.

Q. You got it both ways. Didn't you do that so that afterwards when you got him before the Grand Jury, if you couldn't get him to agree to those words, you would do the best you could and get him to agree to that second one?

A. No. I never thought of evidence in my mind. The only thing [128] in that statement is just

(Testimony of J. H. Miller.)

exactly what Rose said, and I put it down exactly as he said it.

Q. You have told this jury that Rose couldn't read that himself?

A. He said he didn't have his glasses.

Q. He didn't read it, did he?

A. No. I didn't know he couldn't read it.

Q. You know he didn't read it?

A. I know I handed it to him to read.

Q. You know he didn't read it?

A. Yes, sir.

Q. And the reason he gave was that he didn't have his glasses with him and he couldn't read it?

A. Yes, sir.

Q. Now, you have told this jury that you thought Frank Hall read every word of it to him?

A. Yes. I said I believed he had.

Q. You believed he had? A. Yes.

Q. You could possibly be a little mistaken about that?

A. I could be mistaken, the same as any other mortal.

Mr. PRATT.—That is all.

Mr. ROTH.—That is all. The Government rests.

Mr. PRATT.—We rest.

TESTIMONY CLOSED. [129]

The case was argued to the jury by the attorneys for the respective parties, and the Court read written instructions to the jury, which written instructions are as follows: [130]

[Title of Court and Cause.]

Instructions to the Jury.

GENTLEMEN OF THE JURY:

1.

The defendant, J. P. Rose, is accused by the Grand Jury of the crime of rape, and is now on trial before you. The indictment charges that the said J. P. Rose, on the first day of June, 1913, at Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this Court, did then and there wilfully, unlawfully and feloniously, carnally know and abuse one Grace Carey, a female child, then under the age of sixteen years, to wit: of the age of twelve years, he, the said J. P. Rose, then and there being a male person over the age of twenty-one years.

2.

The defendant has entered a plea of not guilty, and such plea controverts and denies each and every essential element of the crime charged in the indictment, and places the burden upon the prosecution of **proving** each such element beyond a reasonable doubt, before you can find the defendant guilty of said crime so charged.

3.

You are instructed that in this case the jury and the Judge of this court have separate functions to perform; It is the duty of the jury to hear all the evidence in the case, all of which is addressed to you, and to decide thereupon all questions of fact.

It is the duty of the Judge of this court to instruct you upon the law applicable to the evidence and facts in this case, and the [131] law makes it your duty to accept, as law, what is laid down as such by the Court in these instructions. And you are instructed that these instructions are to be taken and considered by you together as a whole.

4.

You are instructed that the Indictment in this case is a mere accusation, and is not, in itself, any evidence of the defendant's guilt.

5.

The defendant is presumed to be innocent of the crime charged against him in the Indictment until he is proven guilty, beyond a reasonable doubt, by the evidence produced in this case and submitted to you, and this presumption of innocence is a right guaranteed to the defendant by the law and remains with him and should be given full force and affect by you until such time, in the progress of the case, as you are satisfied of his guilt, from the evidence, beyond a reasonable doubt. The presumption of innocence is not a mere form, to be disregarded at pleasure, but it is an essential and substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases.

6.

The term "reasonable doubt" as defined by the law and as used in these instructions, means that state of the case which after a careful comparison and consideration of all the evidence in the case, leaves the minds of the jury in that condition that they

cannot feel an abiding conviction amounting to a moral certainty of the truth of the charge. The term "reasonable doubt" does not mean any doubt, but such doubt must be actual and substantial as contradistinguished from mere vague apprehension, and must arise from the evidence, or from a want of evidence, or from both such sources.

A reasonable doubt is not a mere whim, but is such a doubt [132] as arises from a careful and honest consideration of all the evidence in the case; and the evidence is sufficient to remove all reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon the conviction without hesitation in their own most important affairs.

Proof beyond a reasonable doubt does not mean proof beyond any doubt.

7.

You should not consider any evidence sought to be introduced but excluded by the Court, nor should you consider any evidence that has been stricken by the Court from the record, nor should you take into account, in making up your verdict, any knowledge or information known to you not derived from the evidence given upon the witness-stand.

8.

The jury are instructed that they are the sole judges of all questions of fact in this case, and they should determine the same from the evidence in the case. But your power in this connection is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence

laid down in these instructions.

9.

In considering the evidence in this case, you are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses when their evidence does not produce conviction in your minds, against a lesser number of witnesses, or other evidence, which is satisfying to your minds.

10.

In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to [133] or feeling for or against any of the parties to the case; the probability or improbability of such witness' statements; the opportunity he had to observe and to be informed as to matters respecting which he gave testimony before you, and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within the knowledge of such witness. It is your duty to give to the testimony of each and all of the witnesses appearing before you such credit as you consider the same justly entitled to receive.

And, in this connection, you are instructed that evidence is to be estimated not only by its intrinsic weight, but also according to the evidence which it is within the power of the one side to produce, and of the other to contradict; and, therefore, if the

weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence is within the power of the party offering the same, the evidence so offered should be viewed with distrust.

11.

You are instructed that if you find that any witness has wilfully testified falsely in one part of his testimony in this case, you may distrust any part, or all, of the testimony of such witness. And, if you believe from the evidence that any witness appearing before you in this case has wilfully testified falsely, you are at liberty to reject the entire testimony of such witness; but you are not bound to reject the entire testimony of a witness because he has testified falsely in some part of his testimony, you should reject the false part, and should give to the other parts such weight as you may deem they are justly entitled to receive.

The foregoing instruction is applicable to female as well as male witnesses, also the same is to apply to No. 10.

You should not fail to weigh and consider fairly and give proper effect to all testimony which you consider truthful.

12.

You are instructed that a person charged with the commission [134] of a crime shall, at this own request, but not otherwise, be deemed a competent witness in his own behalf,—the credit to be given to his testimony being left solely to the jury under the instructions of the court.

You are instructed that, in this case, the credit to be given to the testimony of the defendant, J. P. Rose, who has appeared at his own request as a witness before you, is left solely to you, and you should give to it the same fair and candid consideration you do to the testimony of other witnesses in the case, but you are entitled to take into consideration the interest of the defendant in the result of the trial, as affecting his credibility.

13.

You are instructed that the question of punishment is reserved for the court, and that the jury have nothing to do with that branch of the case, and are not to consider the same.

It is for you to determine solely whether or not the defendant is guilty of the crime charged in the indictment. The matter of the form and severity of the punishment, in the event of conviction, is to be left to the discretion of the Court.

14.

You are instructed that whoever has carnal knowledge of a female person, forcibly and against her will, or, being sixteen years of age, carnally known and abuses a female person under sixteen years of age, with her consent, is guilty of rape.

15.

The intent to have sexual intercourse, where the female is under the age of consent, is an essential element in the crime, and must be proven beyond a reasonable doubt; and this may be done by proof of any facts or circumstances tending to show such intent. In this case, it is also essential that the

Government prove, beyond a reasonable doubt, that the act of sexual intercourse charged in the indictment was committed during the month of July, 1913, and about three weeks prior to the 24th day of said month. [135]

16.

You are instructed that, to constitute the crime of rape, it is necessary that penetration be shown, and, if penetration be shown to have actually taken place as a matter of fact, the degree of penetration is immaterial.

Penetration, as herein used, means the penetration of the female organ of a female with the male member or penis of a male.

17.

You are further instructed that it is the policy of our law, as expressed in the statute, that any female under the age of sixteen years shall be incapable of consenting to the act of sexual intercourse, and that anyone committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtained her consent thereto; and whether the girl in fact consented or resisted is immaterial in this case.

In this case neither the element of force nor the question of consent has any application. The witness, Grace Carey, could not consent, and the law resists for her.

18.

The Government would not be required to show the age of Grace Carey by a family record or any instrument; such proof may be made by oral testimony of witnesses, and the said Grace Carey is a compet-

ent witness as to her age, and such testimony may be based upon information with respect thereto, if any she may have from her parents.

19.

The jury are instructed that evidence has been introduced on the part of the prosecution for the purpose of proving that at another time, prior to the time about three weeks before the 24th day of July, 1913 when the alleged offense upon which they rely for a conviction is charged to have occurred, the defendant had sexual intercourse with the witness, Grace Carey; and the jury [136] are further instructed that they cannot convict the defendant for such previous offense, although you may believe beyond a reasonable doubt that it occurred as testified to by the witness, Grace Carey, for the reason that the defendant is not upon trial for that offense,—the only purpose for which you can consider such evidence, if you believe the same to be true, is upon the question of the design or intent of the defendant, and as hearing upon the likelihood or probability of the defendant having committed the offense charged in the indictment, and for no other purpose.

20.

The jury are instructed that while it is a rule of law that the prosecution is not bound to prove the crime alleged in the Indictment, to have occurred upon the day set forth in the Indictment, but may prove it to have occurred at any time within three years prior to the date of the finding of the indictment, nevertheless, where, as in this case, the prosecution has elected to prove an offense at another

time, to wit, in the month of July, 1913, and about three weeks prior to the 24th day of said month of July, it is bound to prove to your satisfaction, beyond a reasonable doubt, that such offense was committed by the defendant at the time and place testified to by the witnesses in this case, before you can find the defendant guilty.

21.

You are instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant J. P. Rose, being then and there over the age of twenty-one years, at Fairbanks in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, in the month of July, 1913, and about three weeks prior to the 24th day of said month, did have carnal knowledge of Grace Carey and did penetrate the female organ of Grace Carey with his male member or penis, and that said Grace Carey was then and there a female person under the age of sixteen years and was not then and there the wife of the defendant, J. P. Rose, you will find the defendant guilty of the crime of rape, as charged in the indictment. [137]

22.

You are instructed that in the case of rape it is not essential that the one upon whom the rape is alleged to have been committed should be corroborated by the testimony of other witnesses as to the particular act constituting the offense; and if the jury believe, beyond a reasonable doubt, from the testimony of the witness, Grace Carey, that the defendant did commit the crime as charged, the law

would not require that the witness, Grace Carey, should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the crime was committed, but such uncorroborated testimony should be viewed with caution.

23.

You are instructed, gentlemen of the jury, that if you believe and find from the evidence that, at the time it is charged that the defendant committed the crime of rape, he was a man whose reputation for chastity in the community in which he lived was good, then you should take such good reputation into consideration in passing upon the question of his guilt or innocence, for the law presumes that a chaste man is less likely to commit a sexual crime than one who is not chaste. If, however, upon a consideration of all the evidence in the case, you believe him to be guilty, beyond a reasonable doubt, you should not acquit him solely upon the ground of his good reputation for chastity, if you find the same to have been proved.

24.

The charge of rape against a person is easy to make, difficult to prove and more difficult to disprove, and in considering a case of this kind, it is the duty of the jury to carefully and deliberately consider, compare and weigh all the testimony, facts and circumstances bearing on the acts complained of, and the utmost care, intelligence and freedom [138] from bias should be exercised by the jury in the consideration thereof.

25.

Your duty to society and to this defendant obligates you to give your earnest and careful attention to every feature of the case now on trial before you, so that the defendant may not be unjustly convicted nor wrongfully acquitted. Under the solemnity of your oaths as jurors, you must consider all of the evidence in the case, under the instructions of the Court, and upon the law and the evidence you must reach, if you can, a just verdict, which the law and the rights of this defendant demand of you. And, in determining the guilt or innocence of the defendant, under the evidence, it becomes your duty to accept the law of the case as laid down in these instructions. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree, nor, on the other hand, should he surrender any conscientious views founded on the evidence. It is the duty of each juror to reason with his fellows concerning the facts, with an honest desire to arrive at the truth, and with a view of arriving at a verdict. It should be the object of all the jury to arrive at a common conclusion, and to that end, deliberate with calmness.

In conformity with the law, I have prepared two forms of verdict which you will take with you to your jury room, and, when you shall have unanimously agreed upon a verdict, you will sign, by your foreman, the form upon which you have agreed, and return the same into Court as your verdict, and destroy the other form.

The forms are:

1. Guilty as charged in the Indictment.
2. Not guilty. [139]

I now hand you the written instructions which I have just read to you, for your guidance, and the Indictment; both of which you will return into Court with your verdict.

Given at Fairbanks, Alaska, April 4th, 1916.

CHARLES E. BUNNELL,
District Judge. [140]

Thereupon the defendant, in the presence of the jury and before they retired to deliberate on their verdict, took the following exceptions to the written instructions read by the Court to the jury.

Defendant excepts to instruction numbered 11, on the ground that the same is contradictory with itself, which exception is allowed by the Court.

Defendant excepts to instruction numbered 17 on the ground that it is misleading and contradictory, which exception is allowed by the Court. [141]

[Title of Court and Cause.]

Motion for a New Trial.

The defendant moves the Court for an order setting aside the verdict of the jury in this case, on the following grounds:—

1st. Because of the insufficiency of the evidence to justify the verdict and also because the same is against the law.

2d. For errors of law occurring at the trial and excepted to by the defendant in the particulars specified below:—

(a) Misleading and incorrect statements as to the law applicable to the evidence, in instructions numbered 11 and 17;

(b) In sustaining the objection interposed by the District Attorney to the question propounded to J. J. Patten, a witness in behalf of the defendant, the question being in substance as to whether the witness knew the general moral character by reputation of Grace Carey, the prosecutrix, at Fairbanks, where she resides, and also by the same ruling denying defendant the right to call other witnesses to the same fact;

(c) In permitting the Government over his objections and exceptions to cross-examine the defendant as a witness in his own behalf, as to the contents of a written statement made by him in the Marshal's Office, and his evidence in relation thereto at the trial of Wooldridge in this Court.

(d) In receiving in evidence, in rebuttal, over his objections and exceptions, the testimony of Deputy Marshals Hall and Miller as to the circumstances under which defendant signed, and the contents of the written statement referred to in subdivision "C." [142]

3d. Because of newly discovered evidence material to the defendant's case, which he was not aware of and could not produce at the trial.

LOUIS K. PRATT,

Attorney for Defendant.

Service of the above motion admitted, by copy thereof, this 6th day of April, 1916.

R. F. ROTH,

United States Attorney. [143]

Service of a copy of the foregoing this 3d day of May, 1916.

R. F. ROTH,
U. S. Attorney.

[Endorsed]: Filed May 3, 1916. Refiled May 6, 1916. [144]

[Title of Court and Cause.]

Notice of Hearing of Settlement of Bill of Exceptions.

To R. F. Roth, U. S. Dist. Atty.,

Attorney for above-named plaintiff:

You are hereby notified that at 10 o'clock A. M. on the 6th day of May, 1916, or as soon thereafter as counsel can be heard, at the courtroom of the above-named court, at Fairbanks, Alaska, the issues in the above-entitled action, raised by the application of defendant for the settlement of his Bill of Exceptions will be brought on for the signature of the District Judge of said Div. to the certificate attached thereto and for an order for filing the same and making it a part of the record in the case.

LOUIS K. PRATT,

Attorney for Deft.

Time of hearing of matter above set forth as per written notice is hereby shortened to May 6th, 1916.

CHARLES E. BUNNELL,

District Judge.

Service by receipt of a copy of the above notice acknowledged this 3d day of May, 1916.

R. F. ROTH,
Attorney for Plaintiff.

[Endorsed]: Filed May 3, 1916. [145]

[Title of Court and Cause.]

Order Allowing Defendant's Proposed Bill of Exceptions.

Now, on this day, Harry E. Pratt, Assistant United States Attorney appearing in behalf of plaintiff, and Louis K. Pratt, Esq., appearing in behalf of defendant, and this being the time set for hearing defendant's proposed Bill of Exceptions herein, and counsel for the Government having been duly served with a copy of same and making no objection thereto, said proposed Bill of Exceptions is hereby allowed.

CHARLES E. BUNNELL,
District Judge. [146]

[Title of Court and Cause.]

Certificate to Bill of Exceptions, and Order.

United States of America,
Territory of Alaska,—ss.

I, the undersigned Judge of said Court, hereby certify that the foregoing contains a full, true and correct transcript of all the evidence introduced and heard at the trial of said action, together with all objections and exceptions taken to the admission

and rejection of testimony; the Instructions of the Court as read to the jury, with the exceptions thereto by defendant, and the motion for a new trial; and that the same is a true bill of exceptions of all matters therein contained, not otherwise appearing of record.

It is therefore ordered that the Clerk of the Court file the same as such bill of exceptions, the same when filed to be and remain a part of the record in the said case.

Dated at Fairbanks, Alaska, the 6th day of May, 1916.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 548.

[Endorsed]: Filed May 6, 1916. [147]

[Title of Court and Cause.]

**Motion for Order Allowing Supersedeas and Fixing
Amount of Bond.**

The defendant moves the Court for an order allowing a supersedeas in this case and fixing the amount of the bond, and providing that such bond when given and approved by the Judge of said court, shall operate as a supersedeas and stay the further execution of the judgment and sentence herein.

The records and files in the case will be used at the hearing of this motion.

LOUIS K. PRATT,
Attorney for Defendant.

Service of the foregoing motion admitted and receipt of a copy acknowledged this 15th day of May, A. D. 1916.

R. F. ROTH,

United States Attorney.

[Endorsed]: Filed May 15, 1916. [148]

[Title of Court and Cause.]

**Order Denying Motion for Supersedeas and Fixing
Amount of Bond.**

Now, on this day, Louis K. Pratt, Esq., counsel for defendant, having filed in open court a motion for an order allowing supersedeas and fixing amount of bond herein and said motion having been considered by the Court,

It is ordered that said motion be, and the same is, hereby denied.

CHARLES E. BUNNELL,

District Judge. [150]

[Title of Court and Cause.]

Assignment of Errors.

The defendant below and plaintiff in error will rely for a reversal of the judgment and sentence herein on the following errors committed by the Court during the progress of the trial, to wit:

I.

The Court erred in overruling the demurrer to the indictment herein charging him with statutory

rape interposed by the defendant before his plea.

II.

The Court erred in sustaining objections to and in refusing to permit answers to be made by Grace Carey, the prosecutrix, to question asked by defendant's attorney in cross-examination, the object and purpose of which was to show that, in the summer of 1915, on the occasion of her making a trip by river steamers from Fairbanks to Dikeman and return, she had had indiscriminate sexual intercourse with the cooks, waiters, cabin boys, some of the officers and others aboard the steamer "Washburn," on the trip from Holy Cross, Alaska, to Dikeman, and from the latter point back to Tanana or Fort Gibbon, and also with the soldiers at Fort Gibbon.

III.

The Court erred in allowing the District Attorney to propound questions in cross-examination to defendant while on the stand as a witness in his own behalf and in requiring defendant [152] to answer such questions over his objections, to the effect and in substance that he, defendant, on the evening of February 15th, 1916, at his shop on Lacey Street, Fairbanks, had heard a conversation with one W. H. Wooldridge, and that later in the evening of the same day, defendant made a statement concerning such conversation at the Marshal's office in Fairbanks, in the presence of J. H. Miller, Chief Deputy Marshal, and four other deputies, which statement was taken down in writing by said J. H. Miller, and sworn to before Frank Hall, one

of said deputies present and that said statement contained one clause in the language following: "Wooldridge asked me about Laura while I was lying on the bed and said he wanted to screw her or words that gave me to understand that he wanted to have sexual intercourse with her." That defendant was then interrogated as to his testimony as a witness for the Government, delivered March 9, 1916, in the case of United States of America vs. W. H. Wooldridge, on a charge of statutory rape and attempt against the person of one Laura Herington and long extracts from his said testimony were read to him, all of which he was compelled to admit he had given at said trial, which conflicted with and modified the extract from said statement signed on February 15th, 1916.

IV.

The Court erred in allowing the Government to call as witnesses in rebuttal said J. H. Miller and Frank Hall and in permitting them to testify over his objections to the circumstances under which said statement of February 15th, 1916 was prepared, all the details thereof and defendants knowledge of its contents, the said statement being properly identified and showed to the said witnesses and examined by them while giving their evidence, such testimony when compared with said statement and defendant's [153] sworn evidence as a witness for the Government in the Wooldridge case, showing a prima facie case of perjury against him.

V.

The Court erred in sustaining the objections of

the District Attorney to and refusing an answer to the question propounded by defendant's attorney to J. J. Patton, a witness for defendant, as follows:

"Q. Do you know what her (refers to Grace Carey) general moral character is as made up from general reputation on that subject?"

VI.

The Court erred in giving and reading to the jury that part of its charge numbered 17 in the following language:

"17

"You are further instructed that it is the policy of our law, as expressed in the statute, that any female under the age of sixteen years shall be incapable of consenting to the act of sexual intercourse and that anyone committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtained her consent thereto; that whether the girl in fact consented or resisted is immaterial in this case. In this case neither the element of force nor question of consent has any application. The witness, Grace Carey, could not consent, and the law resists for her."

VII.

The Court erred in overruling defendant's motion for a new trial.

VIII.

The Court erred in pronouncing sentence against him and adjudging that he be punished by imprisonment in the penitentiary at McNeil's Island, State

of Washington, for a period of eight years. [154]

LOUIS K. PRATT,

Attorney for Defendant below and Plaintiff in Error.

Service and receipt of copy of the foregoing Assignment of Error is hereby admitted this 15th day of May, 1916.

R. F. ROTH,

United States Attorney.

[Endorsed]: Filed May 15, 1916. [155]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judge of the District Court, for the Territory of Alaska and District of Alaska, Fourth Division, Greeting:

Because in the record and proceedings, as also in the rendition of the sentence and judgment in a criminal action in said District Court before you between J. P. Rose, defendant below, and plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened to the great damage of the said defendant below and plaintiff in error, as by his petition for a writ of error appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of

San Francisco, in the State of California, on the 14th day of June, 1916, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States the 15th day of May, 1916.

[Seal] J. E. CLARK,
Clerk of the U. S. District Court for the Territory of
Alaska, Fourth Division. [157]

The foregoing Writ is hereby allowed.

CHARLES E. BUNNELL,
Judge.

Service of the foregoing Writ of Error and receipt of copy thereof is hereby admitted this 15th day of May, 1916.

R. F. ROTH,
U. S. District Attorney. [158]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to R. F. Roth,
U. S. District Attorney, Fourth Division, Territory of Alaska:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ

of error filed in the Clerk's office of the District Court for the Territory and District of Alaska, of the Fourth Judicial Division thereof, wherein J. P. Rose is the plaintiff in error and the United States of America is the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the plaintiff in error in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 15th day of May, 1916, and of the Independence of the United States the one hundred and thirty-ninth.

CHARLES E. BUNNELL,
District Court Judge Presiding in the District Court
for the Territory and District of Alaska, Fourth
Division.

ATTEST:

[Seal]

J. E. CLARK,

Clerk of the District Court for the Territory and District of Alaska, Fourth Division.

Service of the above Citation by the receipt of a copy thereof is hereby admitted this 15th day of May, 1916.

R. F. ROTH,
U. S. District Attorney. [160]

[Title of Court and Cause.]

Order Enlarging Return Day.

On application of the said plaintiff in error, by reason of the great distance between Fairbanks,

Alaska, and San Francisco, California, and the delays and uncertainties of the transmission of mail matter between the said points,

IT IS ORDERED that the return day of the writ of error allowed in this cause, returnable on the 14th day of June, A. D. 1916, be enlarged to the first day of August, A. D. 1916.

Dated at Fairbanks, Alaska, this 15th day of May, 1916.

CHARLES E. BUNNELL,
Judge.

Entered in Court Journal No. 13, Page 561.

Service of the above Order is hereby admitted this 15th day of May, 1916.

R. F. ROTH,
U. S. District Attorney. [161]

[Title of Court and Cause.]

Certificate of Clerk, U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, J. E. Clark, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of one hundred and sixty-two pages numbered from 1 to 162 inclusive, constitutes a full, true and correct transcript on writ of error in Cause No. 722—Criminal, entitled United States of America, Plaintiff, vs. J. P. Rose, Defendant, wherein J. P. Rose is plaintiff in error, and the United States of America is defendant in error, and was made pursuant to and in accordance with the

praecipe of the plaintiff in error filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause and is the return thereof in accordance therewith.

And I do further certify that the index thereof, consisting of pages i to iii, is a correct index of said transcript on appeal; also that the costs of preparing said transcript and this certificate, amounting to Sixty-five and 30/100 (\$65.30) Dollars, has been paid to me by counsel for plaintiff in error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 29th day of May, A. D. 1916.

[Seal]

J. E. CLARK,

Clerk of the District Court, Territory of Alaska,
Fourth Judicial Division.

By Sidney Stewart,

Deputy Clerk. [162]

[Endorsed]: No. 2819. United States Circuit Court of Appeals for the Ninth Circuit. J. P. Rose, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed June 30, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

[Title of Court and Cause.]

Stipulation under Rule 23.

It is stipulated between the attorneys for the parties respectively that in printing the record in this case for use in the said Court, all captions should be omitted after the title of the cause has once been printed, and the words "caption and title" and the name of the paper or document should be substituted therefor; also that after printing the endorsements and file marks on the indictment, bill of exceptions, record in the Appellate Court, and on the exhibits introduced in evidence and offered, the indorsements and file marks on all other papers should be omitted, and the words "file marks" printed in lieu thereof. After printing the assignment of errors, writ of error and citation other papers connected with the writ of error need not be inserted in the record. Otherwise than as above indicated we desire that the transcript of the case be printed in its entirety.

LOUIS K. PRATT,

Attorney for Plaintiff in Error.

R. F. ROTH,

United States Dist. Attorney.

By H. E. PRATT,

Deputy U. S. Atty. [164]

[Endorsed]: No. 2819. In the United States States Circuit Court of Appeals for the Ninth Circuit. J. P. Rose, Plaintiff in Error, vs. The United States of America, Defendant in Error. Stipulation as to Printing Record. Filed Jul. 22, 1916. F. D. Monckton, Clerk.

IN THE

United States 8

Circuit Court of Appeals

For the Ninth Circuit.

J. P. ROSE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Filed

JUN 29 1916

F. D. Monckton,
Clerk.

LOUIS K. PRATT,
Attorney for Plaintiff in Error.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

J. P. ROSE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief on Behalf of Plaintiff in Error.

STATEMENT OF THE CASE.

This case is a mere echo of the case of W. H. Wooldridge, Plaintiff in Error, vs. The United States of America, Defendant in Error, now pending in this court.

On the evening of February 15, 1916, Mr. Rose, the plaintiff in error, was sitting in the living-room at the rear of his repair-shop, on Lacey Street, in the town of Fairbanks, talking with said W. H. Wooldridge. Deputy marshals had placed themselves in a hallway adjoining this room so that they could, through an opening cut in the sheeting on the partition, see the two men as they sat talking and could hear part, at least, of their conversation. Presently a half-breed Indian girl, by the name of Laura Herrington, came in at the front door of the shop and passed on through to the living-room, and some ordinary conversation was had between the two men and the girl. At this juncture several deputy marshals appeared on the scene and especially at the front door of the shop.

Rose and Wooldridge were invited to go to the

marshal's office in the courthouse, which they did. Mr. Rose was taken to the marshal's office, and with five deputy marshals present was asked to make a statement of the conversation between himself and Wooldridge on that evening at his shop, and of what transpired on that occasion, which he then and there voluntarily did. His statement was taken down in writing by Chief Deputy Marshal J. H. Miller, but not having his spectacles with him, he was unable to read it, so Frank Hall, one of the deputies, and also a notary public, read the statement and swore him to it after he had signed it.

On February 17th the grand jury had under consideration an indictment against W. H. Wooldridge for statutory rape, charged to have been committed in December, 1914, and an attempt to commit the crime of statutory rape on the girl, Laura Herrington, at Mr. Rose's shop on the evening of February 15, 1916, during which Mr. Rose was examined as a witness for the Government, but his evidence was quite different from said written statement on the subject of the conversation and occurrences at his shop on that evening, he claiming that the statement was not accurate and could not have been read correctly to him by Frank Hall.

Wooldridge was indicted February 19, 1916, on two counts, the first for statutory rape in December, 1914, and the second for an attempt to commit the same crime at Rose's shop on February 15th, 1916, as against the person of said Laura Herrington.

March 2, 1916, the indictment against Rose was returned by the grand jury and was marked "Secret,

Without Bail." No warrant of arrest was issued till March 27, 1916, on which date he was arrested, placed in the jail, and has remained there and in the penitentiary at McNiel's Island since.

The trial of Wooldridge commenced on the 5th or 6th of March, 1916, and while the secret indictment was on file, but before a warrant had been issued thereon and on March 9, 1916, Mr. Rose was called to the stand as a witness for the Government, and testified substantially as he had before the grand jury, the District Attorney confronting him with the said written statement as he had done before the grand jury. Rose proved to be a very disappointing witness for the prosecution, his evidence being in material conflict with said "statement." Accordingly, on March 27, 1916, a warrant was issued on the secret indictment in his case, and it was then ascertained to be a charge of having, on June 1, 1913, committed the offense of statutory rape upon a half-breed Indian girl by the name of Grace Carey.

A demurrer to the indictment for insufficiency within Chapter 7, Title 15, Alaska Code, and because it did not state facts sufficient to constitute a crime, was interposed by the plaintiff in error, and overruled, after which he plead not guilty, and his trial took place in April of this year, and on April 12, 1916, he was sentenced to imprisonment at McNiel's Island for a period of eight years.

At the trial the only witness against Mr. Rose was the prosecutrix, Grace Carey, a girl of fifteen years of age. She testified to an act of sexual in-

tercourse between herself and J. P. Rose, defendant below, very near to the Fourth of July, 1913, and another similar act a week or two before that. The Government produced no other witnesses directly or indirectly corroborating Grace Carey. The defendant as a witness in his own behalf, denied having had sexual intercourse with Grace Carey at the times and place mentioned by her or at any other time or place.

To show that the prosecution was not in good faith, and that defendant was not on trial for the reason that he had committed a crime, but rather because he had offended the District Attorney in the matter of giving evidence in the Wooldridge case, Mr. Rose was asked in chief whether he had been a witness for the Government before the grand jury and at the trial of Wooldridge in the District Court on March 9, 1916, and as to whether the District Attorney became angry at him by reason of the evidence he gave, to which he answered in the affirmative, and also testified that at the time he testified on March 9, 1916, he had been informed and believed that there was on file a secret indictment charging him with the same crime as Wooldridge had been indicted for; but Mr. Rose was not asked, nor did he testify in chief, anything concerning the nature of the charge against Wooldridge nor the evidence he had given in that case. He also gave evidence in chief that prior to his trial the District Attorney had sworn to a complaint before a magistrate, charging him with perjury in the Wooldridge case, upon which he had been bound

over to the grand jury, but, of course, said nothing about the particulars of the charge and nothing about the basis of it.

These questions propounded to defendant below and his answers thereto were made the pretext to cross-examine him at length as to the said "statement" signed by him February 15, 1916, which was taken from the files in the Wooldridge case, and one sentence, and only one, viz., "Wooldridge asked me about Laura while I was lying on the bed and said he wanted to — her, or words that gave me to understand that he wanted to have sexual intercourse with her," was quoted and read to him therefrom (Plffs. Ex. 1 in Wooldridge's case), and also long extracts from his evidence at the trial of Wooldridge delivered by him March 9, 1916, were read, and he was compelled by the Court, over objection that it was not cross-examination, to admit signing the statement and having given the evidence in the District Court, but before resting defendant made the record in this case show all the facts above detailed in regard to the time of the return of the "secret indictment," the date of service of the writ of arrest, etc. (See Tr., pp. 104, 3.) *Rose* P 97

In rebuttal the Government, over defendant's objections was allowed by the Court to show by two deputy marshals, viz., J. H. Miller and Frank Hall, all the details in reference to the signing of said "statement" by Rose at the marshal's office on the evening of February 15, 1916, and in doing that to display the statement itself (Plffs. Ex. 1 in the Wooldridge case), and refer to *one sentence only*,

the one above quoted, both of said witnesses swearing that Mr. Rose gave the statement voluntarily, that it was read over to him by Frank Hall in its entirety, and that he thoroughly understood every part thereof, including the sentence above quoted before signing and swearing to it. (See Tr., pp. 120 to 129.) (Record 115-12)

By this time the defendant below was convicted of perjury with no opportunity to defend against it, for giving false evidence in the Wooldridge case, and, of course, his denials of the evidence of Grace Carey became worthless, and for that reason and no other, a verdict of guilty was returned against him by the jury.

*In the District Court for the Territory of Alaska,
Fourth Judicial Division.*

No. 722—Cr.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. P. ROSE,
Defendant.

ASSIGNMENT OF ERRORS.

The defendant below and plaintiff in error will rely for a reversal of the judgment and sentence herein on the following errors committed by the Court during the progress of the trial, to wit (See Tr., p. 152):

I.

The Court erred in overruling the demurrer to the

indictment herein, charging him with statutory rape, interposed by the defendant before his plea.

II.

The Court erred in sustaining objections to and in refusing to permit answers to be made by Grace Carey, the prosecutrix, to question asked her by defendant's attorney in cross-examination, the object and purpose of which was to show that in the summer of 1915, on the occasion of her making a trip by river steamers from Fairbanks to Dikeman and return, she had had indiscriminate sexual intercourse with the cooks, waiters, cabin-boys, some of the officers, and others aboard the steamer "Washburn" on the trip from Holy Cross, Alaska, to Dikeman and from the latter point back to Tanana or Fort Gibbon, and also with the soldiers at Fort Gibbon.

III.

The Court erred in allowing the District Attorney to propound questions in cross-examination to defendant while on the stand as a witness in his own behalf, and in requiring defendant to answer such questions over his objections, to the effect and in substance that he, defendant, on the evening of February 15, 1916, at his shop on Lacey Street, Fairbanks, had heard a conversation with one W. H. Wooldridge, and that later in the evening of the same day defendant made a statement concerning such conversation at the marshal's office in Fairbanks, in the presence of J. H. Miller, Chief Deputy Marshal, and four other deputies, which statement was taken down in writing by said J. H. Miller, and

sworn to before Frank Hall, one of said deputies present, and that said statement contained one clause in the language following: "Wooldridge asked me about Laura while I was lying on the bed, and said he wanted to screw her, or words that gave me to understand that he wanted to have sexual intercourse with her." That defendant was then interrogated as to his testimony as a witness for the Government, delivered March 9, 1916, in the case of United States of America vs. W. H. Wooldridge, on a charge of statutory rape and attempt as against the person of one Laura Herrington, and long extracts from his said testimony were read to him, all of which he was compelled to admit he had given at said trial, which conflicted with and modified the extract from said statement signed on February 15, 1916.

IV.

The Court erred in allowing the Government to call as witnesses in rebuttal said J. H. Miller and Frank Hall, and in permitting them to testify over his objections to the circumstances under which said statement of February 15, 1916, was prepared, all the details thereof and defendant's knowledge of its contents, the said statement being properly identified and shown to the said witnesses and examined by them while giving their evidence, such testimony, when compared with said statement and defendant's sworn evidence as a witness for the Government in the Wooldridge case, showing a *prima facie* case of perjury against him.

V.

The Court erred in sustaining the objections of

the District Attorney to and refusing an answer to the question propounded by defendant's attorney to J. J. Patton, a witness for defendant, as follows:

“Q. Do you know what her [refers to Grace Carey] general moral character is as made up from general reputation on that subject?”

VI.

The Court erred in giving and reading to the jury that part of its charge numbered 17, in the following language:

“17.

“You are further instructed that it is the policy of our law, as expressed in the statute, that any female under the age of sixteen years shall be incapable of consenting to the act of sexual intercourse, and that anyone committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtained her consent thereto; and whether the girl in fact consented or resisted is immaterial in this case. In this case neither the element of force nor question of consent has any application. The witness Grace Carey could not consent, and the law resists for her.”

VII.

The Court erred in overruling defendant's motion for a new trial.

VIII.

The Court erred in pronouncing sentence against him and adjudging that he be punished by imprisonment in the penitentiary at McNiel's Island, State

of Washington, for a period of eight years.

LOUIS K. PRATT,

Attorney for Defendant Below and Plaintiff in
Error.

ARGUMENT.

I.

The first assignment of error is for overruling the demurrer to the indictment. A discussion of this assignment involves several sections of our Criminal Code and Code of Criminal Procedure, among others, section 1894, 1895 and 2009, Alaska Code (1913). The two first sections were borrowed from the Ohio Criminal Code, and section 2009 from 24 U. S. Stats. at Large, p. 636, sec. 4. (See, also, for corresponding sections, Carter's Code, secs. 14 and 15, p. 4, and sec. 129, p. 27.) These sections read as follows:

Sec. 1894. That whoever has carnal knowledge of a female person forcibly and against her will, or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.

Sec. 1895. That a person convicted of rape upon his daughter, or sister, or a female person under twelve years of age, shall be imprisoned in the penitentiary during life; and a person convicted of rape upon any other female person shall be imprisoned in the penitentiary not more than twenty years nor less than three years.

Sec. 2009. That if any person related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with such other so related person, knowing her or him to be within said degree, of relationship, the person so offending shall be deemed guilty of incest, and on conviction thereof shall be punished by imprisonment in the penitentiary not less than three years and not more than fifteen years.

Our Code on the subject of criminal pleading was taken from the act of the Oregon legislature passed Oct. 19, 1864, at a time when there was no such a crime in that state as "statutory rape," and probably not in any of the other states, from which it follows that the form of indictment for rape found therein is inapplicable to the crime of "statutory rape," so called, the definition of which was taken from the Ohio Code. (See Chap. 7, p. 704, Alaska Code 1913, and especially secs. 2147, 2149, 2150, 2157 and 2158. Corresponding secs., Carter's Code, chap. 7, p. 5, and Appendix, p. 128.) The indictment in this case follows the old Oregon form, now appearing on p. 707, Alaska Code (1913). Secs. 6816 and 6817, Ohio Criminal Code (secs. 1894 and 1895, Alaska Code 1913), define and fix the punishment for two distinct, substantive crimes, the one forcible ravishment and the other fornication, misnamed therein "rape," and the Ohio Supreme Court has so held. At common law, and under statutory

definitions following it (as our sec. 1894 does), to constitute rape, the act must have been done against the consent of the female, that is by force, either actual or constructive, but it was always realized that girls of tender age were incapable of yielding an intelligent consent, so that at common law it was conclusively presumed that a girl under ten years of age was incapable of consenting, and by statute different ages are adopted for the one to which the presumption should become effective; for example, by ours the age of twelve years. By the common law, where the girl was under ten years of age, and under our Code under twelve, the act of the boy or man is looked upon as so corrupt and fraudulent as to deprive him rightfully of the defense that the female consented, and by calling his conduct "constructive force," aided by the presumption referred to, the crime of forcible ravishment is made out.

The other substantive offense defined and punished by said sections is usually referred to in the decisions and by text-writers as "statutory rape," but in reality is *fornication*, and to avoid confusion, should have been placed in a section by itself and called "Fornication," "Unlawful sexual intercourse," or by some other appropriate name. (State vs. White (Ks.), 25 Pac. 33.)

Read literally, said sections 1894 and 1895 mean that in all cases of forcible ravishment, the punishment shall be imprisonment for life, if the female is less than twelve years old, or the daughter or sister of the defendant, and imprisonment in the penitentiary for a period ranging from three to twenty

years in all other instances. And for “statutory rape” (where the intercourse must be by consent), the punishment is imprisonment for life if the female is under twelve years of age or over twelve and under sixteen ^{or} and the daughter or sister of the defendant, and imprisonment in the penitentiary from three to twenty years where the carnal knowledge was with a girl other than a daughter or sister, who was at the time over twelve and under sixteen years of age. But this result as to punishment for “statutory rape” in imposing a life sentence is unreasonable, and, if possible, should not be imputed to the lawmakers, and moreover conflicts with section 2009, defining “incest,” because the act of the boy or man having sexual knowledge of his daughter or sister, with her consent, at a time when she was over twelve and under sixteen years of age, would be *incest* under that section, punishable by imprisonment for a period of three to fifteen years.

To harmonize and reconcile sections 1894, 1895 and 2009, so that the Court, counsel, jury, defendant and spectators may know what is really taking place, I maintain that they should be construed to mean that the first offense defined by section 1894 covers all instances of forcible ravishment, without reference to the age of the male or female, but if the girl be under the age of twelve years, her nonconsent is conclusively presumed; that the second crime defined thereby includes all cases where the male is over the age of sixteen years and the female is over twelve and under sixteen years of age and consents to the act, that is, gives an *intelligent consent* which the law itself assumes, and is not the daughter or

- sister of the defendant; acts of sexual intercourse by consent, between father and daughter or sister, or between brother and sister, are incest under section 2009, where the girl or woman is over twelve years old.

From this it logically follows that when section 1894, in the last clause, denounces as a crime the act of a boy or man over sixteen years of age, having carnal intercourse with a girl under that age, with her consent, it had in contemplation the protection of girls possessing sufficient knowledge to give an *intelligent consent*. The two sections assume, or rather arbitrarily presume, that a girl over twelve and under sixteen years of age, if she submits willingly to sexual embraces, does so intelligently. This being the true construction of the law, it is a matter of course that the indictment must charge the act to have been committed *with her consent* to differentiate it from forcible ravishment and incest. The indictment here fails to allege that the girl, Grace Carey, consented. (See Tr., p. —.)

From the indictment the defendant did know that the charge against him was "that he, being over sixteen years of age, had carnal knowledge of Grace Carey at a time when she was over twelve and under sixteen years old," but he had no way of telling whether the Government would introduce evidence of a forcible ravishment or a carnal intercourse by consent. If the former, then the "outcry" and "recent complaint" of the prosecutrix would have been admissible in evidence, because both are the natural concomitants of such outrages, but if the "consent" phase was to be relied on, then complaints

are unnatural, and only come, if at all, from brazen impudence in the guise of gossip and tattle, and are hence mere hearsay. The defendant had a right to be informed of the nature and extent of the crime charged, and therefore attacked the indictment by demurrer (Tr., p. 3), and insisted there, as he does here, that the charge is wholly bad in not stating that the intercourse was had with the consent of the prosecutrix.

Section 2157, Alaska Code (1913), reads: "That words used in a statute to define a crime need not be strictly pursued in the indictment, but other words conveying the same meaning may be used." The indictment in Rose's case omits entirely the words of the statute, "with her consent," and makes no reference thereto in any form of language. Usually, no doubt, a charge in the language of the statute is sufficient, but I submit that in order to avoid confusion and conflict as between said sections 1894, 1895 and 2009, an indictment for "statutory rape," to be direct and certain, must allege in substance, "that the defendant, being a male person over the age of sixteen years, had carnal intercourse with the prosecutrix with her consent, she at the time being a female person over twelve and under sixteen years of age, and not his daughter or sister."

State vs. Carl, 71 Ohio St. 259, 266; S. C. 73 N. E. 463.

State vs. Hensley, 75 Ohio St. 255, 267. 79 NE 462

Hubert vs. State (Neb.), 104 N. W. 276.

State vs. Lee Yan Yan, 10 Pac. 365.

State vs. Daly (Ore.), 18 Pac. 357.

15 Ency of Form. 17093
Bishop on Stat Crimes Sec 436

State vs. Birchard (Ore.), 59 Pac. 468, 471.

State vs. Hoskinsen (Ks.), 96 Pac. 138.

People vs. Wilmot (Cal.), 72 Pac. 838.

State vs. Griffin (Wash.), 86 Pac. 951, 954.

There is another permissible argument that can be advanced in favor of the demurrer to the indictment. Chapter 7, page 673, Alaska Criminal Code (1913), defines and specifies the punishment for all sexual offenses affecting "Morality and decency," except "Fornication," among which are adultery, unlawful cohabitation in a state of adultery or fornication, polygamy, seduction and incest.

In 1909, Congress, by section 318, Chapter 13, U. S. Criminal Code, defined the offense of "Fornication" in this language, to wit:

"If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months." This section is a part of the United States Penal Code, and is made especially applicable by the act itself to the Territories, of which Alaska was and is one. The act of sexual intercourse by consent with a girl over twelve and under sixteen years of age is fornication, and calling it "rape" does not make it that crime, so it may fairly be argued that section 318 of the United States Penal Code takes the place of the last clause of section 1894, defining "statutory rape," supersedes it and by repugnancy effects its repeal. If this was declared to be the condition of the law, then Alaska, by Chapter 7, page 673, Alaska Code (1913), with said section 318, would have as complete a code of law on the subject of sexual offenses as could be

found in the codes of any of the States, and at the same time it would be tangible and just. Under it carnal knowledge of a girl over twelve and under sixteen would ordinarily be either adultery or fornication, but of course might in this instance be incest.

1st Wigmore on Ev., sec. 402 (3).

State vs. White (Ks.), 25 Pac. 33.

II.

The second assignment of error complains of the ruling of the Court in sustaining objections made to questions asked the prosecutrix, Grace Carey, on cross-examination, to show her lascivious conduct while a passenger, in the summer of 1915, on the river steamer "Washburn" from Holy Cross to Dikeman, and from that point to Fort Gibbon. The questions went to the moral character of the witness, and were clearly admissible to affect her credibility. (See Tr., pp. 45-57.) *Record 140-40*

The fifth assignment of error is based on the same reason and authority, and will be submitted with the second. (See Tr., p. 104.) *Record 1100*

Sec. 1501, Alaska Code (1913).

Leverick vs. Frank, 6 Ore. 212.

State vs. Bacon (Ore.), 9 Pac. 393.

State vs. Welch (Ore.), 68 Pac. 808.

Riedsecker vs. Wade (Ore.), 138 Pac. 485,
486.

Gerlinger vs. Frank (Ore.), 145 Pac. 1069.

People vs. Fong-Ching (Cal.), 91 Pac. 105.

State vs. Apley (N. Dak.), 48 L. R. A. (N. S.)
269, 283.

2d Wigmore, sec. 1610.

3d Wigmore, sec. 1983.

III.

The third assignment predicates reversible error upon the action of the Court in overruling the objections to questions asked the defendant below by the District Attorney on cross-examination.

Mr. Rose had been asked on the direct about giving evidence as a witness for the Government before the grand jury on February 17, 1916, and before a trial jury in the District Court on March 9, 1916, in the case of United States vs. W. H. Wooldridge, and as to the fact of the dissatisfaction with him on the part of Mr. Roth, the District Attorney, on account of his testimony in that case, but he was asked nothing and said nothing about the nature of the charge against Wooldridge, nor as to what evidence he had given, nor as to the statements made by him that were the basis of the charge of perjury preferred by the District Attorney. On his cross-examination the Court allowed the District Attorney, over the objection that it was not proper cross-examination, to go back to Rose's statement made on the evening of February 15, 1916, at the marshal's office, and single out and read to him one sentence therefrom (the one quoted above), and then read long extracts from his evidence on the same subject at the trial of Wooldridge on March 9, 1916, and interrogated him at length in regard to such statement and evidence.

I claim that such a course of questioning was clearly outside the scope of a legitimate cross-examination of the matters brought out in his direct examination, and that it was very damaging to the defendant below, notwithstanding his version on

cross-examination of the conversation at his shop, the making of the statement, etc., was substantially the same as told before in the grand jury room and at the Wooldridge trial. Our Code (1913), by section 1498, fixes the general rule as to the limits of a cross-examination, and by section 2258 another and different one is prescribed in the instance of a defendant on the stand in a criminal case giving evidence in his own behalf. In the latter situation the cross-examination is much circumscribed as compared with the scope of the cross-examination under said section 1498. Our section 2258 is a copy of section 1365, Hill's Annotated Laws of Oregon, with the last sentence or part of a sentence omitted, that is, the language in the Oregon Code, "upon all facts to which he has testified, tending to his conviction or acquittal," was not retained by the codifiers of the Alaska Code. But that this omission makes no change in the construction and meaning of our section 2258, seems self-evident. The Supreme Court of Oregon, in *State vs. Saunders*, 12 Pac., page 445, expressed the opinion that on general principles of criminal evidence, a defendant, when on the stand as a witness, could not be asked on cross-examination as to whether he had been charged with the commission of or had committed some crime different from the one upon which he was being tried, at some other time and place, and that certainly under the Oregon Code he could not be so interrogated. The Supreme Court of the United States, in *Fitzpatrick vs. United States*, seems to hold that our section 2258 means and should be applied the same as the Oregon Supreme Court construed section 1365 of Hill's Annotated

Oregon Code, and both courts cite the same Oregon cases as authority for their views. Even under section 1498, Alaska Code (1913), it would not have been permissible for the District Attorney to go into the distinct and collateral matters of the "statement" in the marshal's office and Rose's evidence in the Wooldridge case. But having done so, the Government was bound by his answers, and evidence in rebuttal was highly improper and prejudicial. (Tr., pp. 91 to 98.)

8th Pleading & Prac., pp. 102, 103, 104, 127.

1st Wigmore, sec. 194.

State vs. Lurch (Ore.), 6 Pac. 408, 410.

State vs. Saunders (Ore.), 12 Pac. 441, 445.

State vs. Olds (Ore.), 22 Pac. 940.

State vs. Gray (Ore.), 79 Pac. 53.

State vs. Jensen (Ore.), 140 Pac. 740.

State vs. Trego (Idaho), 138 Pac. 1124.

Fitzpatrick vs. United States, 178 U. S. 305;
S. C., 44th Law Ed. 1078, 1083.

Goltra vs. Penland (Ore.), 77 Pac. 129.

Simmons vs. O. R. & N. Ry. Co. (Ore.), 69
Pac. 1022.

Schreyer vs. Turner Flouring Mills Co.
(Ore.), 43 Pac. 719, 723, col. 2.

IV.

The fourth assignment is for the error in permitting the Government to dispute the testimony of the defendant below, given by him on cross-examination on the subject of the "statement," and his evidence in the District Court in Wooldridge's case, by calling Chief Deputy Marshal J. H. Miller and

Deputy Frank Hall, as witnesses in rebuttal. It may be that the defendant's evidence in the cross-examination would not have injured him materially, if left as he delivered it, because it was consistent and reasonable, but when those two witnesses were allowed to testify as to all the details of the signing of the "statement" in the marshal's office, Rose was utterly discredited, and made to appear as a perjurer, with no opportunity to right himself on that charge. He was then dumb before his accusers and at the mercy of an abandoned girl. The questions and answers on cross-examination were collateral to his evidence in chief, and the Government was estopped to deny their truthfulness, and the error of the Court in overruling his objections to the testimony of Miller and Hall was glaring, and resulted in a verdict of guilty, not of rape but for perjury. Alaska is indeed a "Wonderland" in more ways than one. (Tr., pp. 91 to 98.) *Review pp 115-124*

Fenstermaker vs. Tribune Pub. Co. (Utah),
43 Pac. 112, 117.

3d Wigmore, secs. 1863, 1904.

V.

The sixth assignment is for giving the seventeenth instruction, section 1894, Alaska Code (1913), makes it a crime for a boy or man over the age of sixteen to have sexual intercourse with a girl under that age, by the consent of the girl. This instruction turns the whole section around, and tells the jury that consent or nonconsent has nothing to do with the case from any point of view, and that under it the girl would be incapable of consenting if she wanted to. The effect of this instruction on the jury

could only be, and doubtless was, to arouse feelings of amazement mingled with doubt, culminating in a confused idea of what they were there for and what it was they were trying to do, anyhow.

VI.

The seventh assignment is for denying the motion for a new trial. It was well taken, and should have been sustained by the trial court and its numerous errors corrected here.

The eighth assignment complains of the judgment and sentence. It was indeed hard that an old man, fifty-nine years of age, should have to go to a penitentiary for a period of eight years, practically for the remainder of his life, on the uncorroborated testimony of a young Indian girl, who by her own evidence was and is vicious and dissolute, and that against his positive denials.

VII.

It may be claimed that the defendant's counsel failed to say "excepted to by defendant" after some of the adverse rulings on the reception or rejection of evidence. The record does show exceptions to the more important rulings, but in some instances, merely the objection, the statement of the grounds therefor, and the adverse ruling appear.

Section 1052, Alaska Code (1913), gives a definition of an exception as follows: "An exception is an objection taken at the trial, to a decision, * * * on the admission of evidence, etc." In reason, when an objection to the admission or rejection of evidence is taken, with the grounds of such objection stated, followed by a ruling of the trial court on such objection, a complete record, fair to the trial court

and intelligent to a reviewing court, is made. It would then show that the lower court's attention was directly called to the ground of the objection, and that he had ruled advisedly on the point raised by the objection, and to say that after the ruling the attorney for the party injured must say, "I except," or anything else, seems far-fetched and meaningless. Some such thought as this must have been in the minds of the congressional committee that gathered together the matter which was enacted into a law and is known as the Alaska Code of Civil Procedure. How else can one account for section 1056, Alaska Code (1913), which reads:

Sec. 1056. The verdict of the jury, any order or decision, partially or finally determining the rights of the parties, or any of them, or affecting the pleadings, or granting or refusing a continuance, or granting or refusing a new trial, or admitting or rejecting the evidence, provided objection be made to its admission or rejection at the time of its offer, or made upon *ex parte* application or in the absence of a party, are deemed excepted to without the exception being taken or stated, or entered in the journal.

This section was not in the Oregon Code, and I do not know where the codifiers got it. Possibly it was partly or wholly phrased by them. It became law June 6, 1900, is general in its terms, and there is nothing in the Code of Criminal Proc. of 1899 of like import. (See Carter's Cr. C., Chap, 17, p. 72; also p. 1.) It follows that Oregon decisions on this point of practice are inapplicable, and all that is re-

quired under the Alaska practice is to make the objection, state the reasons therefor, and secure a ruling of the Court thereon, and get all this in a bill of exceptions, all of which was done in this case.

Respectfully submitted,

LOUIS K. PRATT,

Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

9

THE UNITED STATES NATIONAL BANK OF CENTRALIA, a Banking Association, and A. R. TITLOW,
as Receiver of Said Bank,

Appellants,

vs.

THE CITY OF CENTRALIA, a Municipal Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

Filed

JUL 21 1916

F. D. Monckton,

Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES NATIONAL BANK OF CENTRALIA, a Banking Association, and A. R. TITLOW,
as Receiver of Said Bank,

Appellants,

vs.

THE CITY OF CENTRALIA, a Municipal Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Bill of Complaint.....	3
Answer of the United States National Bank and Clinton A. Snowden, Receiver of the United States National Bank of Centralia, Lewis County, Washington, to the Amended Bill of Complaint of the City of Centralia, a Municipal Corporation.....	16
Assignments of Error.....	116
Attorneys, Names and Addresses of.....	1
Certificate of Clerk, U. S. District Court, to Transcript of Record.....	129
Certificate (of Comptroller) Directing Appeal..	120
Citation on Appeal (Copy).....	119
Citation on Appeal (Original).....	131
Decree.....	28
Defendant's Exceptions (to Decree).....	37
EXHIBITS:	
Plaintiff's Exhibit No. 1—Schedule.....	45
Plaintiff's Exhibit No. 3—Resolution of City of Centralia.....	50
Plaintiff's Exhibit No. 4—Detail of Bank Transfers.....	59
Plaintiff's Exhibit No. 5—Bank Account..	65

EXHIBITS—Continued:

Plaintiff's Exhibit No. 6—Bank Account..	66
Plaintiff's Exhibit No. 7—Notation of National Bank of Commerce of Seattle.	73
Plaintiff's Exhibit No. 9—Letter.....	75
Plaintiff's Exhibit No. 10—Balances Due Bank from Various Correspondents..	84
Defendant's Exhibit "A"—Transcript of Account of Banks.....	77
Names and Addresses of Attorneys.....	1
Notice of Filing Defendant's Proposed State- ment of Evidence.....	121
Order Allowing Appeal.....	118
Order Approving Statement of Evidence.....	114
Order Directing Transmission of Plaintiff's Original Exhibit No. 11 to Appellate Court.	133
Order Enlarging Time for Filing of Record to and Including June 30, 1916.....	136
Order for Preliminary Injunction.....	122
Petition for Appeal.....	115
Praecipe of the Defendants for Record.....	2
Praecipe of the Plaintiff for Additional Por- tions of the Record.....	127
Statement of Testimony.....	39
Stipulation and Order as to Exhibits.....	128
Stipulation for Substitution of Parties Defend- ant and Solicitors for Defendants.....	27
Stipulation Re Transmission of Plaintiff's Original Exhibit No. 11 to Appellate Court.....	134

Index.

Page

TESTIMONY ON BEHALF OF PLAINTIFF:

DAUBNEY, J. W.....	39
Cross-examination.....	42
Redirect Examination.....	42
Recross-examination.....	43
Redirect Examination.....	43
HILL, FRANK A.....	55
JOHNSON, H. O.....	72
Cross-examination.....	76
Redirect Examination.....	79
Recross-examination.....	83
LEE, L. MABEL.....	51
Cross-examination.....	54
MASON, GEORGE B.....	83
SHORROCK, ERNEST G.....	44
Redirect Examination.....	47
Cross-examination.....	49
Recalled.....	56
Cross-examination.....	68
Redirect Examination.....	70
Recross-examination.....	71
Redirect Examination.....	71
Recross-examination.....	72
Recalled.....	86
Cross-examination.....	86

TESTIMONY ON BEHALF OF DEFEND-
ANT:

HILL, FRANK A. (Recalled).....	89
Cross-examination.....	101
Redirect Examination.....	103
Recross-examination.....	103

Index.	Page
TESTIMONY ON BEHALF OF DEFEND-	
ANT—Continued:	
Redirect Examination.....	104
JOHNSON, H. O. (Recalled).....	88
Cross-examination.....	89
Writ of Preliminary Injunction.....	124

Names and Addresses of Attorneys.

R. P. OLDHAM, Esquire, Hoge Building, Seattle,
Washington, and

R. C. GOODALE, Esquire, Hoge Building, Seattle,
Washington,

Solicitors for the Appellants.

WILLIAM R. LEE, Esquire, City Attorney, Cen-
tralia, Washington;

SAMUEL H. PILES, Esquire, Pioneer Building,
Seattle, Washington;

JAMES B. HOWE, Esquire, Pioneer Building,
Seattle, Washington; and

STEPHEN V. CAREY, Esquire, Pioneer Building,
Seattle, Washington,

Solicitors for the Appellee. [1*]

*In the District Court of the United States for the
Western District of Washington, Southern
Division.*

IN EQUITY—No. 25—E.

THE CITY OF CENTRALIA, a Municipal Cor-
poration,

Plaintiff,

vs.

THE UNITED STATES NATIONAL BANK OF
CENTRALIA and A. R. TITLOW, as Re-
ceiver of said Bank,

Defendants.

*Page-number appearing at foot of page of original certified Record.

Praeceptum of the Defendants for Record.

To Frank L. Crosby, Clerk of Said Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco a typewritten transcript of the record upon appeal in the above-entitled cause containing the following portions of the record in the above-entitled cause, to wit (omitting all captions, endorsements, verifications, etc., excepting file-marks).

1. Amended bill of complaint.
2. Answer to the amended bill of complaint.
3. Stipulation for substitution of parties and order allowing same.
4. Decree.
5. Defendants' exceptions to decree.
6. Statement of evidence and order approving same.
7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.
10. Citation.
11. Praeceptum of defendants for record.
12. Certificate of Comptroller of Currency directing appeal.
13. Notice of filing defendants proposed statement of testimony. [2]

Dated February 17, 1916.

R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Defendants.

Copy of the within praecipe received and service acknowledged this 19th day of February, 1916.

PILES, HOWE & CAREY and
W. N. BEALS,

Attorneys for Plaintiff.

Per S.H.P.

(Filed Feb. 18, 1916). [3]

Amended Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, Southern Division, Sitting in Equity:

The City of Centralia, a municipal corporation, created and existing under the laws of the State of Washington and operating under a commission form of government provided by Chapter 116 of the Laws of 1911 of the State of Washington, located in the county of Lewis, in the Southern Division of the Western District of Washington, with leave the court first had and obtained, brings this its amended bill of complaint against The United States National Bank of Centralia, Washington, a national banking association, located and doing business in the city of Centralia, in the county of Lewis, in the Southern Division of the Western District of Washington, and against C. A. Snowden, as receiver of said bank, said receiver being a citizen of the State of Washington and a resident of the county of Pierce in the Southern Division of the Western District of said State; and thereupon your

orator complains and shows unto your Honors: [4]

I.

Your orator at all times herein mentioned was and it now is a municipal corporation, with a population now exceeding fifteen thousand, organized and existing under the laws of the State of Washington, located in the county of Lewis, in the Southern Division of the Western District of Washington, and operating under a commission form of government as provided by Chapter 116 of the Laws of 1911 of the State of Washington.

II.

At all times herein mentioned The United States National Bank of Centralia, Washington, was and it still is a national banking association, duly organized and existing under the National Bank Act of the United States of America, located and having its principal and only place of business in the City of Centralia, county of Lewis, in the Southern Division of the Western District of Washington.

III.

On or about the 21st day of September, 1914, The United States National Bank of Centralia, Washington, being then insolvent, and the Comptroller of the Currency being satisfied of such insolvency, Francis R. Chapman was duly appointed by said comptroller receiver of said bank, to close up its affairs as provided by law. Francis R. Chapman duly qualified as such receiver, took possession and control of all the money of said bank and all its property and assets of every character, and continued to act as such receiver until on or about the

17th day of November, 1914, when the defendant C. A. Snowden was duly appointed by the Comptroller of the Currency as receiver of said bank to succeed said Chapman. The defendant Snowden thereupon duly qualified as such receiver and assumed possession and control of all said bank's moneys, property and assets, and ever since said date he has been [5] and still is the duly appointed, qualified and acting receiver thereof; and ever since on or about September 21, 1914, said defendant bank has been and it still is insolvent.

IV.

At all times in this bill mentioned the National Bank of Commerce of Seattle, Washington, was a national banking association, located and doing business at Seattle, Washington, and was the regular correspondent and reserve bank of Seattle, Washington, of the United States National Bank of Centralia, Washington.

V.

Pursuant to a vote of its electors, the City of Centralia prior to July 1st, 1914, provided for the issuance and sale of certain water or utility bonds of the par value of \$300,000.00, for the purpose of purchasing a privately owned water system then operated in said city and converting the same from a pumping to a gravity system and otherwise improving said system of water-works, for the use and benefit of said city and its inhabitants. Said issue of bonds was sold to Carstens & Earles, Inc., of Seattle, Washington, to be delivered by the city to the purchaser from time to time as funds were

needed to carry on the work for which said bonds were voted and issued.

VI.

On or about the 11th day of July, 1914, George B. Mason, who was then the duly elected or appointed, qualified and acting treasurer of the said City of Centralia, delivered one hundred and five (105) of said water bonds of the par value of \$52,500.00 (the same being the balance of said total issue of \$300,000.00 par value) to the defendant bank, for the purpose of having it collect the amount due from Carstens & Earles Inc., pursuant to the terms of said sale. Thereupon George B. Mason, as [6] such treasurer, drew a draft on Carstens & Earles, Inc., for the amount due, with directions to the defendant bank to deliver the bonds to Carstens & Earles, Inc., upon the payment of the amount of the draft and accrued interest on the bonds to the date of delivery. The defendant bank, on or about the 12th day of July, 1914, transmitted the bonds and draft to Carstens & Earles, Inc., at Seattle, Washington, through the medium of its then regular correspondent and reserve bank in said city, to wit, the National Bank of Commerce of Seattle, Washington, which last named bank delivered the bonds to and received the sum of \$50,911.88 lawful money of the United States from said Carstens & Earles, Inc., on or about July 13, 1914.

VII.

The National Bank of Commerce of Seattle after it delivered said 105 bonds and collected the purchase price thereof, as aforesaid, credited The

United States National Bank of Centralia, Washington, with the sum of \$50,911.88 and so advised said bank. Thereupon The United States National Bank of Centralia charged said sum of \$50,911.88 to the National Bank of Commerce of Seattle, and deposited said sum with itself to the credit of George B. Mason, as such city treasurer.

VIII.

At the time defendant bank received said 105 bonds it knew the purpose for which they had been issued and at the time it collected said sum of \$50,911.88 and deposited the same with itself, as in this bill hereinbefore set forth, it knew that the sum so collected and deposited was the proceeds of the sale of said bonds and that the money so collected and deposited was held by the said city treasurer as a public officer in trust for your orator and that such money could not be used for any purpose other than the purchase and improvement of said system of waterworks. [7]

IX.

On or about February 6, 1912, the defendant bank was designated as a depository for the safekeeping of your orator's funds to the extent of \$10,000.00. upon defendant bank complying with the laws of the State of Washington respecting municipal deposits. Thereafter in the year 1912 defendant bank filed with the city clerk of your orator a surety bond in the maximum amount of deposits designated by the city treasurer to be carried in defendant bank, to wit, \$10,000.00, conditioned as provided by law. Defendant bank never executed to your

orator, to its city treasurer, nor to any other officer of the City of Centralia, or at all, any bond other than said bond of \$10,000.00, nor did it at any time file with the clerk of said city, or any other officer thereof, or at all, a contract as provided by law whereby it agreed to pay not less than two per cent, on the average daily or other balances, where such balances exceeded \$1,000.00 of all municipal funds kept by said treasurer in defendant bank as such depository. The deposit of said sum of \$50,911.88 by defendant bank with itself and to the credit of the city treasurer, as in this bill set forth, was without authority of law and in violation of Sections (77-681), (77-683), (135-631), (135-633) and (135-635) Pierce's Code 1912, and by reason of the facts as in this bill set forth, title to said money never passed to the defendant bank, but the same always remained the property of your orator, held in trust by said bank and its receiver for the use and benefit of your orator.

X.

Your orator further shows unto your Honors that prior to the first day of April, 1914, the City of Centralia was indebted to numerous persons in various sums of money, said indebtedness being evidenced by outstanding warrants of said city. [8] In the month of April, 1914, said city provided for the issuance and sale of its refunding bonds for the purpose of taking up and retiring said outstanding warrants, and the Portland Trust and Savings Bank, of Portland, Oregon, became the purchaser of said refunding bonds to the amount of \$118,000.00

par value. To carry out the terms and conditions of said sale, it was agreed between your orator and the Portland Trust and Savings Bank that the defendant bank should act as trustee for the purpose of looking after the proper cancellation of certain of said outstanding warrants which were to be retired from the proceeds of said refunding bonds, and to that end and to enable defendant bank to carry out the purpose of said trust, the city treasurer of Centralia from time to time deposited various sums of money with the defendant bank. The United States National Bank of Centralia accepted said trust, undertook to fulfill its obligation, and in the discharge of said trust, it issued to George B. Mason, as city treasurer of the City of Centralia, its deposit slips marked "Special Deposit" for the several sums left in its care for the purpose stated.

On the 21st day of September, 1914, there was an unexpended balance of \$2641.20 in said fund, which sum was delivered into the hands of the receiver first appointed and by him delivered to his successor, the present receiver C. A. Snowden, in whose possession the same still remains. Said money never became the property of the defendant bank, but always remained the property of your orator, held in trust by said bank and its receiver for the use and benefit of your orator.

XI.

Your orator further alleges that continuously from the date it received your orator's funds, as in this bill set forth, until it closed its doors on September 21, 1914, the [9] defendant bank had said

funds, and each of them, in its possession and control, and the same passed into the possession of the receiver first appointed, and by him were delivered to the present receiver, in whose possession and control said moneys still remain.

XII.

On September 21, 1914, the date on which the defendant bank passed into the hands of a receiver, it was indebted to the City of Centralia in the sum of \$1,000.00 in addition to the two sums of \$50,911.88 and \$2,641.20, held in trust, as in this bill set forth, so that your orator at the time said bank closed its doors had just and valid claims against said bank for the aggregate sum of \$54,553.08. Heretofore, to wit, on or about the 17th day of December, 1914, your orator duly presented to the defendant receiver its claim for the sums belonging to it, but said receiver has failed, neglected and refused to pay the same, or any part thereof, and has refused and does still refuse to recognize said sums of \$50,911.88 and \$2641.20, or either of said sums, or any part thereof, in the possession of the defendant bank at the time it failed, and now in the possession of the defendant C. A. Snowden, as receiver of said bank, as trust funds belonging to your orator.

XIII.

The surety bond given by the defendant bank to the City of Centralia to secure deposits to the amount of \$10,000.00, as alleged in paragraph IX of this bill, was written by the United States Fidelity & Guaranty Company of Baltimore, Maryland. Upon the failure of the defendant bank, said surety com-

pany paid to the City of Centralia the amount of such bond, and took an assignment of the claim of the city against the defendant bank for a like sum. Thereupon said surety company filed its claim with [10] the receiver of said bank for the amount of such claim assigned to it, and the receiver applied such assignment to the payment, first, of the special deposit of \$2641.20, then to the payment of the \$1000.00 deposit, and the balance of \$6358.80 to apply on the trust fund of \$50,911.88, so that there still remains in the hands of the defendant receiver the sum of \$44,553.08 belonging to your orator.

XIV.

Your orator further shows that on the 19th day of September, 1914, being the last day the bank was open for business, and on the 21st day of September, 1914, the day on which the bank failed to open for business, said bank was the owner and in the possession of certain improvement warrants and bonds theretofore issued by the City of Centralia, which warrants and bonds the City of Centralia was and is obliged to pay said warrants and bonds being as follows:

Local Improvement Fund:

Warrant No. 82 Issued to Allred & James in amount of\$1330.00

Warrant No. 89 Issued to Allred & James in amount of.... 6630.13

Total principal 7960.13

Interest on above warrants..... 185.06

Total due on warrants.....\$8145.19

Local Improvement District No. 7,

Bond No. 14, due September 1, 1914..... \$100.00

Local Improvement District No. 25,

Bonds No. 3 and 4 in amount of \$500, each..... 1000.00

Total.....\$9245.19

In addition to the bonds and warrants totaling \$9245.19, as shown above, your orator is informed and believes and therefore alleges the fact to be, that the said defendant bank at the time it closed its doors owned and held other warrants and bonds issued by the City of Centralia and payable by it, which said other warrants and bonds also passed into the possession [11] of the defendant C. A. Snowden, as receiver of said bank, in whose possession the same still remains. The amount of such other warrants and bonds is unknown to your orator and therefore cannot be definitely stated, but to the best of your orator's knowledge and belief, such other warrants and bonds amount to approximately \$1000.00.

XV.

There is not sufficient money, property or assets of said bank to pay its indebtedness in full, and your orator has no plain or adequate remedy at law, or any remedy whatever except that sought herein.

The defendant receiver is about to, and will, unless restrained from so doing, apply the funds in his hands belonging to your orator to the payment of the general indebtedness of said defendant bank, and thereby deprive your orator of its right to receive payment in full of its said claim. And your orator further shows that the defendant receiver has been instructed to declare and distribute, and he will, unless restrained from so doing, distribute a dividend of the moneys now in his hands among the general creditors of said bank ratably in proportion to the amount of their respective claims, and that the said

receiver, unless restrained by this Court from so doing, will make such distribution before your orator can give notice of an application for a preliminary or temporary injunction, whereby the funds in the hands of the receiver which should be rightfully applied in payment in full of your orator's claim, will be wrongfully paid and distributed, and by reason of which your orator will suffer immediate and irreparable loss and damage.

XVI.

This is a suit arising under the laws of the United States, and the amount involved herein exceeds the sum of [12] \$3000.00, exclusive of interest and costs.

Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed for, make a full disclosure and discovery of all matters aforesaid, according to the best and utmost of their knowledge, remembrance, information and belief, full, true and direct answer make to the matters in this bill hereinbefore stated, but not under oath (an answer under oath being hereby expressly waived) your orator prays:

1. That a temporary restraining order be issued by this Court restraining the receiver, C. A. Snowden, his agents, servants and employees, from applying or distributing the funds in his hands, or any part of the same, to the general or any creditors of the defendant bank, until the application of your orator for a preliminary or provisional injunction can be heard

and determined by this court.

2. That upon the hearing of the application, a provisional or preliminary injunction be issued, restraining the said defendant C. A. Snowden, individually and as such receiver, his agents, servants and employees, from applying any of the funds of the said bank in his hands to the payment of the indebtedness of said bank, other than to the payment of the claim of your orator and that upon the final hearing and determination of this suit, said injunction be made perpetual, and it be decreed that the proceeds derived from the sale of the said 105 bonds, to wit, the sum of \$50,911.88, and the amount represented by the aforesaid deposits, to wit \$2641.20, were held in trust by said bank for the use and benefit of your orator, and that the balance of said funds—after deducting the \$10,000.00 assigned to the United States Fidelity & Guaranty Company of Baltimore, Maryland—be [13] decreed to be a trust fund held by the said receiver for the use and benefit of your orator, and that the receiver be required and directed to pay the same to your orator, and that he, his agents, servants and employees, be enjoined from applying any of the funds in his hands, or under his control, or in the possession of the Comptroller of the Currency, to the payment of the general indebtedness of said bank, or otherwise, until your orator shall be paid the full amount of said trust funds.

3. If it shall be found upon the final hearing that said trust funds, or any part of either of them, has been converted into securities or other property or assets of said bank, that your orator be decreed to

have a lien upon the same and upon all the money and assets of said bank for the repayment of said trust funds, and each of them, in full.

4. That the defendants be required to make full disclosure of the number and amount of all warrants and bonds issued by the City of Centralia owned by the defendant bank and in the possession of its receiver, with the amount of principal and interest claimed to be due thereon at the time of filing the defendants' answer, and if upon final hearing it should be held by the Court that your orator is not entitled to the relief hereinabove prayed for, that the amount of such warrants and bonds, with accrued interest thereon, be offset against the amount owing by the defendant bank to your orator.

5. That your orator may have such other, further and different relief as the equities of the case may require and to your Honors may seem meet, including the costs and disbursements in this suit.

May it please your Honors to grant unto your orator not only the injunctive relief prayed for in this bill, but also a writ of subpoena of the United States directed to the said [14] defendant The United States National Bank of Centralia, Washington, a banking association, and to C. A. Snowden, as receiver of such bank, commanding them, and each of them, on a day certain to appear and answer unto this bill of complaint and to obey and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of

equity and good conscience.

THE CITY OF CENTRALIA,
By W. N. BEAL and
PILES, HOWE & CAREY,
Its Solicitors.

SAMUEL H. PILES,
Of Counsel.

(Verified.)

(Filed Feb. 13, 1915.) [15]

**Answer of the United States National Bank and
Clinton A. Snowden, Receiver of the United
States National Bank of Centralia, Lewis
County, Washington, to the Amended Bill of
Complaint of the City of Centralia, a Municipal
Corporation.**

To the Honorable Judges of the District Court of
the United States for the Western District of
Washington, Southern Division, Sitting in
Equity:

Come now the above-named defendants and re-
spondents and for answer to the Amended Bill of
Complaint herein allege and say:

I.

As to paragraph or subdivision I of said Amended
Bill of Complaint these defendants and respondents
admit the allegations therein contained.

II.

As to paragraph or subdivision II of said Amended
Bill of Complaint these defendants and respondents
admit the allegations and statements therein con-
tained.

III.

As to paragraph or subdivision III thereof these defendants and respondents admit the allegations therein contained save and except as to the date when said Clinton A. Snowden became receiver of [16] said bank, and in this connection allege the fact to be that said Francis A. Chapman and not Francis R. Chapman resigned as such receiver upon the 14th day of November, 1914, and said Clinton A. Snowden was appointed as receiver and took possession of said assets and became such receiver on the 16th day of November, 1914.

IV.

As to paragraph or subdivision IV thereof these defendants and respondents admit the allegations therein contained.

V.

As to paragraph or subdivision V thereof these defendants and respondents admit that there were some bonds sold to the firm of Carstens & Earles, Incorporated, of Seattle, Washington, but as to what amount, what price, when delivery was to be made, these defendants and respondents have no knowledge and not sufficient information to form a belief. As to each and every other allegation contained in said paragraph, or subdivision of said Amended Bill of Complaint these defendants and respondents deny that they have any knowledge of the same and deny that they have sufficient information to form a correct belief of the same, therefore they deny each and every other allegation therein contained.

VI.

As to paragraph or subdivision VI thereof these defendants and respondents admit that on or about the date therein mentioned there was some bonds of the kind and character therein mentioned delivered to the defendant for the purpose of collecting and crediting the account of George B. Mason, Treasurer, with said bank, and further admit that at or about the time therein mentioned the National Bank of Commerce of Seattle was a correspondent and reserve bank in said City of Seattle of the defendants and respondents, United States National Bank of Centralia, and as to each and every other allegation therein contained these defendants and respondents deny that they have [17] any knowledge or sufficient information to form a belief, therefore they deny any such and every other allegation in said paragraph or subdivision contained. And further answering said paragraph or subdivision of the Amended Bill of Complaint allege the facts to be that the bonds that were delivered to defendant, United States National Bank of Centralia, Lewis County, Washington, were delivered for the purpose of collecting and crediting the account of George B. Mason, Treasurer, with said United States National Bank, and that such bonds were forwarded by said United States National Bank to the National Bank of Commerce of Seattle, and that the same were by said National Bank of Commerce delivered to said Carstens & Earles. Whether said National Bank of Commerce received the money for the same or credit these defendants and respondents do not know; but

in this connection allege the fact to be that the said National Bank of Commerce of Seattle did, on or about said time, give credit to said United States National Bank on its books of \$50,911.88.

VII.

As to paragraph or subdivision VII thereof these defendants and respondents deny that said United States National Bank of Centralia deposited the money therein alleged, or any part thereof, with itself, and deny that it ever had said money, or any part thereof, in its possession, or that it ever came into the possession of said United States National Bank of Centralia. Said defendants and respondents also deny that they have any knowledge or sufficient information to form a belief as to what said National Bank of Commerce of Seattle took from said Carstens & Earles for a credit or whether they actually received the money for said bonds therein referred to. They admit the said National Bank of Commerce of Seattle on or about said date did credit said United States National Bank of Centralia, Lewis County, Washington, upon its said National Bank of Commerce—books with the sum of \$50,911.88, and that in turn the said United States National Bank of Centralia gave [18] credit to said George B. Mason on its books with said sum of \$50,911.88 as Treasurer of the City of Centralia. They deny each and every other allegation therein contained.

VIII.

As to paragraph or subdivison VIII of said Amended Bill of Complaint these defendants and respondents deny each and every allegation therein contained.

IX.

As to paragraph or subdivision IX of said Amended Bill of Complaint these defendants and respondents admit that said United States National Bank has been designated as a depository for said City of Centralia, and that the said United States National Bank had given said City of Centralia an indemnifying bond to the extent of \$10,000 for the purpose of securing deposits made with said bank by said City of Centralia through its treasurer. These defendants and respondents deny each and every other allegation therein contained.

And further answering said paragraph or subdivision of the Amended Bill of Complaint said defendants and respondents allege the fact to be that said United States National Bank had paid two per cent interest on all daily balances of said city with said bank at all times prior to the closing of said bank on the 21st day of September, 1914, and that said City of Centralia received and accepted the same and ratified the acts of said city treasurer in receiving the same and used the monies received as such interest in the expenses of its municipal affairs, and that said complainant received said two per cent interest upon said sum of \$50,911.88 referred to in said Amended Bill of Complaint and for which this action was brought to recover, which was accepted and received by said city through its duly constituted authorities ratifying and confirming the act of said city treasurer taking credit for said amount with said United States National Bank of Centralia. And that said sum, and each and every part thereof, from and

after said [19] city treasurer took said credit and said city through its said treasurer received its interest on said credit, became and was the property of said United States National Bank of Centralia, and said complainant or said city a mere creditor of said bank from said time on.

X.

As to paragraph or subdivision X of said Amended Bill of Complaint these defendants and respondents admit that the Portland Trust & Savings Bank of Portland, Oregon, became the purchaser of refunding bonds issued by the City of Centralia to take up outstanding indebtedness, evidenced by warrants, for current expenses prior to the time of issuance of said bonds. And said defendants and respondents deny each and every other allegation in said paragraph or subdivision contained.

Further answering said paragraph or subdivision of the Amended Bill of Complaint these defendants and respondents allege the fact to be that the \$2641.20 referred to and mentioned was a credit only in said bank in behalf of the treasurer of said City of Centralia arising from interest and premium on said bonds so sold to said Portland Trust & Savings Bank; and prior to the commencement of this action and on or about the month of December, 1914, the said credit the said City of Centralia had with the said United States National Bank was paid and discharged, and said city treasurer of the City of Centralia and said City of Centralia received during said month of December the sum of \$10,000, being on account of the surety bond securing the deposits of

the City of Centralia in said United States National Bank from the United States Fidelity & Guaranty Company, which, to the extent of said amount of \$2641.20 was used to pay and discharge said credit; and that there is not now and was not at the commencement of this action and the filing of the original Bill of Complaint herein and the Amended Bill of Complaint herein, any such sum or any other sum due from the United States National Bank of Centralia or its receiver to said City of Centralia on account of interest and premium on said bonds so sold to said Portland Trust & Savings Bank. '[20]

XI.

As to paragraph or subdivision XI of said Amended Bill of Complaint these defendants and respondents deny each and every allegation therein contained.

XII.

As to paragraph or subdivision XII of said Amended Bill of Complaint these defendants and respondents admit that on the 21st day of September, 1914, the said City of Centralia, through its treasurer, George B. Mason, had a credit with said United States National Bank for the sum of \$1,000 in addition to the alleged claims of said City for \$50,911.88 and \$2641.20, and admit that on or about the 17th day of December, 1914, the said City of Centralia presented a claim to said defendant, Clinton A. Snowden, as such receiver, claiming a preference claim and that it be paid to the exclusion of all other creditors, a claim for something like \$54553.08, and that the said defendants and respondents refused to

pay the sum of said preference claim to the exclusion of other creditors of said bank.

These defendants and respondents deny each and every other allegation in said paragraph or subdivision contained.

XIII.

As to paragraph or subdivision XIII of said Amended Bill of Complaint these defendants and respondents admit that on or before the commencement of this action, to wit, during the month of December, 1914, the United States Fidelity & Guaranty Company of Baltimore, Maryland, paid to said city treasurer of said City of Centralia the sum of \$10,000 and that the \$2641.20 received as such interest and premium hereinbefore set forth was paid and discharged, and that the balance of said \$10,000 was applied upon the deposit of \$50,911.88. These defendants and respondents deny each and every other allegation in said paragraph or subdivision contained, saving and except that said city did assign to said surety company the claim against said United States National Bank, or part of claim, in the said sum of [21] \$10,000, which arose on account of said payment by said surety company.

XIV.

As to paragraph or subdivision XV of said Amended Bill of Complaint these defendants and respondents deny that they have any knowledge or sufficient information to form a belief as to whether or not said bank has sufficient money, property or assets to pay its indebtedness in full.

Further answering said paragraph or subdivi-

sion of said Amended Bill of Complaint these defendants and respondents admit that, unless restrained by the order of this Honorable Court, they will pay a ten per cent dividend upon the allowed claims at the present time under the orders and directions of the Comptroller of the Currency of the United States, which said claims now aggregate the sum of \$817,123.42, and which said dividend of ten per cent would be ratably distributed under the laws and statutes of the United States and in proportion and ratably to the amount of said respective claims so approved. And these defendants and respondents deny each and every other allegation in said paragraph or subdivision of said Amended Bill of Complaint therein contained.

XV.

As to paragraph or subdivision XVI of said Amended Bill of Complaint these defendants and respondents deny that this is a suit arising under the laws of the United States and they deny that this Honorable Court has jurisdiction of the subject matter of this action.

AND NOW FOR ANOTHER AND FURTHER ANSWER AND BY WAY OF AFFIRMATIVE DEFENSE TO SAID AMENDED BILL OF COMPLAINT OF SAID ORATOR THESE DEFENDANTS AND RESPONDENTS ALLEGE:

I.

That on or about the 11th, 12th, 13th and 14th days of July, 1914, and at no other time thereafter did the proceeds of the sale **[22]** of bonds of the City of Centralia for the purpose of purchasing a

water system, or for any other purpose, ever come into the physical possession or control of said defendant bank, United States National Bank of Centralia, Lewis County, Washington, or into the hands of Francis A. Chapman, receiver of said bank, or the said defendant and respondent, Clinton A. Snowden, receiver of said respondent United States National Bank of Centralia. That the only connection, directly or indirectly, that said United States National Bank of Centralia, Lewis County, Washington, ever had with the proceeds of the sale of any such bonds was to receive a credit with the National Bank of Commerce of the City of Seattle for the sum of \$50,-911.88, which said credit prior to the 28th day of July, 1914, had been exhausted with other and greater credits with said bank in payment of the debts of said United States National Bank to various and sundry creditors throughout the United States; and said defendants and respondents further allege that no moneys, either directly or indirectly, ever came into the physical possession or under the physical control of said United States National Bank of Centralia, arising from said source.

II.

Said defendants and respondents further allege and show unto this Honorable Court, that on the 21st day of September, 1914, the day upon which the Comptroller of the Currency of the United States appointed Francis A. Chapman, receiver of said United States National Bank, there was at said time in cash and in cash items the sum of \$29,628.10, of which said sum there was in actual lawful money

of the United States the sum of \$27,232.60, and that each and every dollar of said moneys and all of said cash items came into said United States National Bank from certain and definite and specific depositors depositing moneys and credits with said bank on the 19th day of September, 1914, and prior to said date for the period of three months, and that no part of the proceeds of the sale of said bonds in said Amended Bill of [23] Complaint mentioned, and not one dollar of the said proceeds and no sum whatever in any amount whatever of said cash items or said moneys in the hands of said bank on the said 21st day of September, 1914, ever came from the said City of Centralia, its treasurer or anyone representing said City of Centralia, or for and on behalf of said City of Centralia, but solely from the source herein alleged, from certain, definite and specific individual depositors during said period of said three months past prior to the 21st day of September, 1914.

WHEREFORE, inasmuch as your said defendants and respondents have fully answered herein and made disclosures as to the facts and circumstances surrounding the transactions had and done between the parties herein, your defendants and respondents pray that said complainant, the City of Centralia, take nothing by its said Amended Bill of Complaint; that the same may be dismissed and that these defendants and respondents may have judgment against said complainant, the City of Centralia, for its costs and disbursements in this action; and that the temporary injunction and restraining

order heretofore granted be dissolved, set aside and held for naught, that the said defendant and respondent, Clinton A. Snowden, receiver of said United States National Bank, may be permitted, without interference, to proceed to pay and distribute the dividend to the creditors of said United States National Bank heretofore ordered and directed to be paid by said Comptroller of the Currency and distribute the assets in accordance with the laws of the United States in such cases made and provided.

THE UNITED STATES NATIONAL BANK
OF CENTRALIA, WASHINGTON, and
CLINTON A. SNOWDEN,
Receiver of Said United States National Bank.

By A. R. TITLOW,
Their Attorney.

(Verified.)

(Filed Feb. 15, 1915.) [24]

**Stipulation for Substitution of Parties Defendant
and Solicitors for Defendants.**

It appearing that C. A. Snowden has resigned from the receivership of the United States National Bank of Centralia, and that A. R. Titlow, formerly solicitor for the receiver, has been duly appointed by the Comptroller of the Currency receiver of the United States National Bank of Centralia, it is stipulated between the parties hereto that A. R. Titlow, as receiver of the United States National Bank of Centralia, be and he is hereby substituted as a party defendant in this cause in the place and stead

28 *United States Nat. Bank of Centralia et al.*

of C. A. Snowden, and that Bausman, Oldham & Goodale are substituted for A. R. Titlow as the solicitors for the receiver and for the bank.

Dated this 3d day of March, 1915.

W. N. BEAL and

PILES, HOWE & CAREY,

Solicitors for Complainant.

BAUSMAN, OLDHAM & GOODALE,

Solicitors for the Receiver and for the United States National Bank.

It is so ordered.

Done in open court this 18 day of May, 1915.

JEREMIAH NETERER,

Judge.

(Filed May 20, 1915.) [25]

Decree.

This cause came on to be heard on the pleadings and proof on the 6th day of July, 1915, and was argued by counsel and thereupon upon consideration thereof, it is found, ordered, adjudged and decreed, as follows, to wit:

I. Complainant at all times mentioned in the Bill of Complaint herein, was and it now is, a municipal corporation, with a population not exceeding fifteen thousand (15,000), organized and existing under the laws of the State of Washington, located in the county of Lewis, in the Southern Division of the Western District of Washington, and operating under a commission form of Government, as provided by Chapter 116 of the Laws of 1911 of the

State of Washington.

II. At all times mentioned in the Bill of Complaint herein, the United States National Bank of Centralia, Washington, was and it still is, a National Banking Association, duly organized and existing under the National Banking Act of the United States of America, located and having its principal and only place of business in the City of Centralia, county of Lewis, in the Southern division of the Western District of Washington.

III. On or about the 21st day of September, 1914, the United States National Bank of Centralia, Washington, was insolvent, and Francis R. Chapman was duly appointed receiver of said bank by the Comptroller of the Currency, to close its affairs as provided by law. Said receiver having duly qualified, took possession and control of said bank and continued to act in such capacity until on or about the 17th day of November, 1914, when he was succeeded as such receiver by C. A. Snowden, who continued to act in such capacity until on or about the 1st day of March, 1915, when said Snowden was succeeded as such receiver by A. R. Titlow, who has been duly substituted in this action as defendant in lieu [26] of the said C. A. Snowden, and who now as the duly qualified and acting receiver of the defendant bank, is in control of all its moneys, property and assets. The defendant bank, ever since the 21st day of September, 1914, has been and it is still, insolvent.

IV. At all times mentioned in the Bill of Complaint herein, the National Bank of Commerce of

Seattle, Washington, was a national banking association, located and doing business at Seattle, Washington, and was the regular correspondent and reserve bank at Seattle, Washington, of the United States National Bank of Centralia.

V. Prior to July 1st, 1914, the City of Centralia, pursuant to a vote of its electors, provided for the issuance and sale of certain water or utility bonds of the par value of three hundred thousand dollars (\$300,000.00), for the purpose of purchasing a privately owned water system then operated in said city, and converting the same from a pumping to a gravity system and otherwise improving said system of waterworks for the use and benefit of said city and its inhabitants. Said issue of bonds was sold to Carstens & Earles, Inc., of Seattle, Washington, to be delivered by said city to the purchaser from time to time as funds were needed to carry on the work for which said bonds were issued and sold.

VI. On or about the 11th day of July, 1914, the City of Centralia, by and through its duly elected, qualified and acting treasurer, delivered one hundred five (105) of said water bonds of the par value of fifty-two thousand five hundred dollars (\$52,500.00), (the same being the balance of said total issue of three hundred thousand dollars (\$300,000.00) par value) to the defendant bank for the purpose of having it collect the amount due from Carsten & Earles, Inc., pursuant to the terms of said sale, and thereupon said city treasurer drew a draft on Carsten & Earles, Inc., for the amount due, with directions to the defendant bank to deliver the bonds to

Carsten & Earles, Inc., upon the payment of the [27] amount of the draft and accrued interest on the bonds to the date of delivery and the defendant bank, on or about the 12th day of July, 1914, transmitted the bonds and draft to Carsten & Earles, Inc., at Seattle, Washington, through the medium of its then regular correspondent and reserve bank at Seattle, the National Bank of Commerce of Seattle, Washington, which last-named bank delivered the bonds to and collected the sum of fifty thousand nine hundred eleven and 88/100 dollars (\$50,911.88) from Carsten & Earles, Inc., on or about July 13th, 1914, said sum being the amount due on said bonds from Carsten & Earles, Inc., to the City of Centralia.

VII. The National Bank of Commerce of Seattle, Washington, after it delivered said bonds and collected the purchase price thereof in the manner hereinbefore stated, credited the United States National Bank of Centralia, Washington, with the sum of fifty thousand nine hundred eleven and 88/100 dollars (\$50,911.88) and so advised said bank, and thereupon the United States National Bank of Centralia, charged said sum of fifty thousand nine hundred eleven and 88/100 dollars (\$50,911.88) to the National Bank of Commerce of Seattle, Washington, and deposited said sum with itself to the credit of the city treasurer of the City of Centralia.

VIII. On the 11th day of July, 1914, the account of the United States National Bank of Centralia, Washington, with the National Bank of Commerce of Seattle, was overdrawn to the amount of eleven

thousand seventy-one and 64/100 dollars (\$11,071.-64), which overdraft continued until the 13th day of July, 1914, on which day deposits to the amount of fifty-five thousand sixty-nine and 77/100 dollars (\$55,069.77) were credited by the National Bank of Commerce of Seattle to the United States National Bank of Centralia, Washington, said credits including the sum of fifty thousand nine hundred eleven and 88/100 dollars (\$50,911.88), which on that day had been collected by the National Bank of Commerce of Seattle, from Carsten & Earles, Inc. The National Bank of Commerce of Seattle, [28] Washington, in the usual and ordinary course of business, applied the said deposits of fifty-five thousand sixty-nine and 77/100 dollars (\$55,069.77) so far as necessary to discharge the overdraft of the United States National Bank of Centralia, so that at the close of business on the 13th day of July, 1914, there remained in the National Bank of Commerce at Seattle, Washington, the sum of forty-four thousand nine hundred ninety-eight and 13/100 dollars (\$44,998.13), to the credit of the United States National Bank of Centralia, Washington. In the ordinary course of business thereafter, said balance of forty-four thousand nine hundred ninety-eight and 13/100 dollars (\$44,998.13) was drawn upon by the United States National Bank of Centralia, Washington, in carrying on its banking operations. At all times from and including the 13th day of July, 1914, until and including the 21st day of September, 1914, there was continuously on hand in the vaults of the United States National Bank of Centralia, and in

the vaults of its reserve agents, cash in excess of the sum of sixty-nine thousand dollars (\$69,000.00).

IX. At the time the United States National Bank of Centralia, Washington, received said one hundred five (105) bonds, it and its officers knew the purpose for which they had been issued and at the time the defendant bank collected the proceeds from the sale of said bonds and deposited same with itself, it knew that the sum so collected and deposited was, in fact, the proceeds of the sale of said bonds and that the moneys so collected and deposited were trust funds which the treasurer of the City of Centralia could hold only as a public officer and that said money could not lawfully be used for any purpose other than the purchase and improvement of said system of waterworks.

X. On or about the 6th day of February, 1912, the United States National Bank of Centralia, was designated as depository for the safekeeping of the public moneys of the city of Centralia to the extent of ten thousand dollars (\$10,000.00), such designation to be effective upon the defendant bank, complying with the laws of the State of Washington respecting municipal deposits. [29] Thereafter in the year 1912 the defendant bank filed with the city clerk of the City of Centralia, a surety bond in the maximum amount of deposits designated by the city treasurer, to be carried in the defendant bank, to wit, the sum of ten thousand dollars (\$10,000.00). The defendant bank never furnished any other bond or any other security as provided by law to secure the repayment of public moneys deposited with it,

nor did it at any time file with the City of Centralia, or with its clerk, or with any other officer thereof, or at all, any contract as provided by law whereby it agreed to pay interest on daily or other balances of municipal funds left with it as a city depository. The deposit of said sum of fifty thousand nine hundred eleven and 88/100 dollars (\$50,911.88) by the defendant bank with itself and to the credit of the city treasurer of the City of Centralia, as hereinbefore stated, was without authority of law and in violation of the statutes of the State of Washington, relative to the depositing of public moneys of cities of the State of Washington, and by reason thereof and of the facts hereinbefore found, the title to the money so deposited by the defendant bank with itself and credited to the city treasurer of the City of Centralia, did not pass to the defendant bank, but same always remained the property of the City of Centralia, held in trust by the said bank for the use and benefit of the said city.

XI. On the 21st day of September, 1914, the day on which the defendant bank closed, there was on deposit in said bank to the credit of the City of Centralia, two other sums of money: One a special deposit, amounting to two thousand six hundred forty one and 20/100 dollars (\$2,641.20), and another deposit amounting to one thousand dollars (\$1,000.00), so that at the time the said bank closed its doors, the City of Centralia had just and valid claims against said bank for the aggregate sum of fifty-four thousand five hundred fifty-three and 08/100 dollars (\$54,553.08).

XII. The surety bond given by the defendant bank to the City of Centralia to secure deposits to the amount of ten thousand dollars (\$10,000.00) was written by the United States Fidelity & Guaranty Co., of Baltimore, Maryland. Upon the failure of the defendant bank the said surety company paid to the City of Centralia, [30] the amount of such bond and took an assignment of the claim of the city against the defendant bank for a like sum, and thereupon said surety company filed its claim with the receiver of said bank for the amount of said claim assigned to it and the receiver applied said assignment to the payment of the complainant's aggregate claim as follows: First, on the special deposit of two thousand six hundred forty-one and 20/100 dollars (\$2,641.20); then on the payment of the one thousand dollar (\$1,000.00) deposit, and the balance of six thousand three hundred fifty-eight and 80/100 dollars (\$6,358.80) was applied in partial payment on the trust fund of fifty thousand nine hundred eleven and 88/100 dollars (\$50,911.88), leaving forty-four thousand five hundred fifty-three and 08/100 dollars (\$44,553.08) for which the City of Centralia has not been reimbursed either by said surety company, or by the defendant bank, or by its receiver and there passed into the hands of the receiver of the United States National Bank of Centralia, cash in excess of said sum of forty-four thousand five hundred fifty-three and 08/100 dollars (\$44,553.08).

XIII. The Court finds, adjudges and decrees that by reason of the premises the proceeds of the sale of

said one hundred five (105) water bonds (\$50,911.88) were trust funds and title to so much thereof as was not secured as provided by law never passed to the defendant bank, that the proceeds of said sale of bonds to the amount of forty-four thousand nine hundred thirty-eight and 13/100 dollars (\$44,938.13) have been traced into the hands of the defendant bank and its receivers; that the complainant is therefore a preferred creditor for the amount due after the payment to it by said surety company of the said sum of ten thousand dollars (\$10,000.00), that is to say, the complainant is a preferred creditor for the amount of forty-four thousand five hundred fifty-three and 09/100 dollars (\$44,553.09), and it is ordered, adjudged and decreed that A. R. Titlow as receiver of the United [31] States National Bank of Centralia recognize the complainant as such preferred creditor and forthwith pay over to it the amount of its claim in full or certify the same to the Comptroller of the Currency for payment in full and it is further ordered, adjudged and decreed that said receiver be and he is hereby perpetually enjoined from disbursing said sum of forty-four thousand five hundred fifty-three and 08/100 dollars (\$44,553.08) among the general creditors of the defendant bank.

XIV. It is further adjudged and decreed that complainant recover its costs which are taxed in the sum of one hundred twenty-seven and 15/100 dollars. To the foregoing and each and every part thereof the defendants except and their exceptions are hereby allowed.

Done in open court this 23d day of August, 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Aug. 23, 1915). [32]

Defendants' Exceptions (to Decree).

The defendants severally specifically except to the foregoing decree in the following respects:

1. To the finding contained in paragraph 7 that the United States National Bank of Centralia deposited the sum of \$50911.88 with itself to the credit of the city treasurer of the City of Centralia, on the ground that the evidence shows that no sum of money was actually deposited with the *United Bank* to the credit of the city treasurer.

2. To the finding contained in paragraph 8 that there was continuously from July 13, 1914, to September 21, 1914, on hand in the vaults of the United States National Bank of Centralia and in the vaults of its reserve agents cash in excess of \$69,000.00, on the ground that any sums held by reserve agents were merely debts owing the United States National Bank, and not cash belonging to that bank.

3. To the finding contained in paragraph 9 that the defendant bank collected the proceeds from the sale of said bonds and deposited such proceeds with itself, on the ground that the evidence shows that no such proceeds were collected by the defendant bank or deposited with itself.

4. To the finding or conclusion contained in paragraph 10 to the effect that the defendant bank held

in trust for the City of Centralia any sum of money whatever, on the ground that the evidence shows that the sum of money therein mentioned was never received by the defendant bank.

5. To the finding contained in paragraph 12 that there passed into the hands of the receiver of the United States National Bank cash in excess of the sum of \$44,553.08, on the [33] ground that the evidence shows that cash to the extent of only about \$27,000.00 passed into the hands of the receiver.

6. To the finding or conclusion contained in paragraph 13, to the effect that the proceeds of the sale of the water bonds were trust funds, and that the proceeds of such bonds to the amount of \$44,938.13, or any other amount, have been traced into the hands of the defendant bank and its receivers, on the ground that these findings or conclusions are contrary to the evidence; to the conclusion contained in paragraph 13 that the complainant is a preferred creditor for the amount of \$44,553.09, or any other sum, on the ground that the proper conclusion from the evidence is that the complainant is an ordinary creditor for that amount; to that part of the decree which orders A. R. Titlow as receiver of the United States National Bank of Centralia to recognize the claimant as such preferred creditor and to pay to it the amount of its claim or to certify the same to the Comptroller of the Currency for payment in full; to that part of the decree which enjoins the receiver from disbursing said sum of \$44,553.09 among the general creditors of the defendant bank; to the decree generally in so far as it adjudges the complainant to be a preferred creditor for any sum

whatever, on the ground that the evidence shows the complainant to be entitled to a general claim only against the defendants.

7. To the decree in so far as it adjudges complainant entitled to recover any costs other than clerk's costs, on the ground that all such other costs have been waived.

The foregoing exceptions were duly taken by the defendants severally at the time of the signing of the foregoing decree, and are hereby allowed *nunc pro tunc* as of August 23, 1915.

Dated August 27th, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Aug. 27, 1915.) [34]

Statement of Testimony.

Testimony of J. W. Daubney, for Plaintiff.

J. W. DAUBNEY, a witness for the plaintiff, testified at a preliminary hearing and admitted herein as follows: That he was the cashier of the United States National Bank from its organization in 1907 until it closed in 1914; that Mr. Mason, the treasurer of the City of Centralia, left with the bank some waterwork bonds for collection. He made a sight draft on Carstens & Earles of Seattle who were the purchasers of the bonds. The bank sent the bonds, together with the sight draft, to the National Bank of Commerce of Seattle for collection, with instructions to deliver the bonds upon payment of the draft to credit the United States National's account with its proceeds and to advise it of the credit. Upon receipt of this advice, the United States National

(Testimony of J. W. Daubney.)

charged the Seattle bank with the amount and credited a like amount to the city treasurer of Centralia. The collection was sent on July 10th, 1914 and was collected and credited by the Seattle bank on July 13th. The amount was \$55,911.88. As soon as the United States National was advised of this credit, it, in turn, credited the city treasurer with a like amount; that the United States National knew that these were water utility bonds of that city, and that they had been issued for the purpose of purchasing the waterworks and converting it from a pumping system to a gravity system, and that they were issued by virtue of a city ordinance.

(Thereupon plaintiff introduced in evidence exhibit 1, which was an ordinance of the City of Centralia relating to the issuance of these bonds. In substance, it provided that these bonds should be drawn solely for the purpose of paying the cost and expense of acquiring, constructing, owning and maintaining a water system, and any surplus from the sale of the bonds should be applied [35] to the payment of the principal and interest on the bonds themselves.

Section 12 of which said ordinance reads as follows:

“Section 12. The money derived from the sale of any of the bonds herein authorized, shall be paid into the said Centralia Water System Fund, as hereinbefore provided, and shall be drawn upon solely for the purpose of paying the costs and expenses of acquiring, constructing, owning and maintaining such water system, and all the costs and expenses connected therewith, and the surplus of the money, if

(Testimony of J. W. Daubney.)

any, from the sale of said bonds over and above the total costs of said waterworks system shall be applied to the payment of said bonds and interest thereon as the same mature."

(Plaintiff's Exhibit No. 2, filed July 6, 1915.)

(This ordinance was introduced as Exhibit No. 1 on the preliminary hearing, and as Exhibit No. 2 on the final hearing.)

The witness, continuing, testified that at the close of business on July 13, 1914, there was actual cash in the vaults of the United States National of \$61,439.82; on the 14th, \$56,051.11; on the 15th, \$43,692.48; on the 16th, \$39,215.77; on the 17th, \$40,102.06; on the 18th, \$39,373.00; that the above sums included actual cash in the vaults of the bank and cash items. Cash items was not the same as cash. The total of cash and cash items on the respective dates thereafter were as follows: July 18, 39,373.31; July 20, 38,318.22; July 21, 52,753.37; July 22, 48,572.77; July 23, 49,749.07; July 24, 47,044.26; July 25, 48,230.03; July 27, 53,193.31; July 28, 54,409.25; July 29, 54,868.35; July 30, 62,856.47; July 31, 55,120.78; August 1, 52,897.11; August 3, 53,676.07; August 4, [36] 52,488.89; August 5, 57,026.65; August 6, 54,394.84; August 7, 60,942.33; August 8, 49,805.07; August 10, 33,805.63; August 11, 42,103.36; August 12, 41,101.94; August 13, 41,177.22; August 14, 48,392.15; August 15, 43,623.74; August 17, 65,309.55; August 18, 72,007.07; August 19, 71,201.48; August 20, 70,072.32; August 21, 70,021.49; August 22, 68,981.04; August 24, 63,182.64; August 25, 61,152.63; August 26, 63,191.11; August 27, 63,484.19; August 28, 64,255.24; August 29, 66,120.40; August 31, 74,524.60; September 1, 74,295.94; September 2,

(Testimony of J. W. Daubney.)

62,389.12; September 3, 72,992.88; September 4, 77,136.08; September 5, 96,071.42; September 8, 89,695.34; September 9, 84,572.75; September 10, 82,537.85; September 11, 47,881.75; September 12, 38,277.66; September 14, 61,528.79; September 15, 42,211.41; September 16, 31,439.28; September 17, 23,527.86; September [37] 18, 31,983.86; September 19, 32,439.44.

There was turned over to the receiver upon insolvency, in cash, \$27,232.60. The bank had never given the City of Centralia any other than the depository bond for \$10,000.00.

Upon cross-examination, the witness testified that no part of the proceeds from the sale of these bonds to Carstens & Earles came to the United States National Bank, in money; that the sale was represented by a credit given the United States National Bank in the National Bank of Commerce at Seattle; that on July 28th, 1914, the account of the United States National Bank with the National Bank of Commerce of Seattle was overdrawn to the extent of \$1,038.64; was again overdrawn on August 4th, \$2,593.94; on August 12th, \$2,442.91; on August 12, \$7,785.98.

On redirect examination, the witness testified that this credit of 50,911 remained with the Seattle bank to the credit of the United States National, and was drawn on in the regular course of business; that if a draft were bought for a thousand dollars, this account might have been drawn on by the United States National giving a draft on the National Bank of Commerce; that between July 12th and 22d, the United States National drew out of the National

(Testimony of J. W. Daubney.)

Bank of Commerce, \$92,341.09, for which it received money, or the equivalent.

In addition to the proceeds from the sale of the water bonds, there was also an item of \$2,641.20 standing to the credit of "G. B. Mason, special account," on the books [38] of the bank. The witness testified that he was not familiar with this account but that his recollection was that it was a balance remaining on hand in the special account for the redemption of warrants.

On recross-examination, the witness testified that the \$10,000.00 transfer of the credit from the National Bank of Commerce to a Chicago bank, whereby the United States National had issued a draft for \$10,000.00, did not create one dollar in the United States National; that it was simply a transfer of credit. This was on July 14th. The witness could not state a single instance where a draft had been purchased on the National Bank of Commerce by a deposit of money with the United States National. Some paid cash and some gave checks when drafts were purchased.

On redirect examination, the witness testified that between July 12th and July 22d, 1914, the \$92,341.09 credit with the National Bank of Commerce was utilized by the United States National either by paying its debts or receiving credit somewhere; that if a man wanted a thousand dollar draft, he would draw his own private check for a thousand dollars and the United States National would give him a draft on the Seattle account, thus reducing the United States National's indebtedness to the amount of one thousand dollars, so that in each and every one of these transactions, the United States National

(Testimony of J. W. Daubney.)

either reduced its indebtedness and obligations to someone else or made deposits with some other bank, or took in lieu actual cash or securities. The witness could not tell how the \$10,000.00 draft of July 14th arose. It might have been a telegraphic transfer; it might [39] have been by letter, or it might have been by draft. Subsequently, when his attention was called to a draft book, he stated that it was a telegraphic transfer.

Testimony of Ernest G. Shorrock, for Plaintiff.

ERNEST G. SHORROCK, a witness for the plaintiff, testified as follows: That he was a certified public accountant and had been such for twelve years; that he had made an examination of the books of the defendant bank between and including July 13th, 1914, and September 19th, 1914. Between and including those dates, the lowest sum in cash on hand in the bank was \$23,527.86, on September 17th, 1914. The lowest sum in reserve banks at any time between and including those dates was \$39,726.39 on August 10th. The lowest amount in the reserve banks and the Centralia bank on any one day between and including those dates was \$69,141.80 on September 17th, 1914. The witness testified that the reserve banks of the United States National between and including July 13th and September 19th, 1914, were as follows: Chase National Bank, New York; National Bank of Tacoma; First National Bank of Portland; National Bank of Commerce, Seattle; Bank of California, Tacoma; Continental & Commercial National Bank, Chicago; First National Bank, San Francisco; Northwestern National Bank, Minneapolis; Seattle National Bank; Northwestern

National Bank, Portland, and Merchants National Bank, Portland.

Plaintiff then introduced in evidence a statement prepared by witness. The first column showed the dates; the next column, the cash on hand, and the next, the amount due from reserve agents. The final column, the total cash on hand and due from reserve agents. This statement was offered [40] in evidence as Plaintiff's Exhibit Number 1, and is as follows:

Plaintiff's Exhibit No. 1—Schedule.

UNITED STATES NATIONAL BANK OF
CENTRALIA.

SCHEDULE OF (1) CASH ON HAND; (2) DUE
FROM RESERVE AGENTS; AND (3) TO-
TAL CASH ON HAND AND DUE FROM
RESERVE AGENTS (AS PER TRIAL BAL-
ANCE BOOK).

1914.

Date.	Cash on Hand.	Due From Reserve Agents.	Total Cash on Hand and Due From Reserve Agents.
July 13	61,439.82	88,971.55	150,411.37
14	56,051.11	82,964.31	139,015.42
15	43,692.48	69,056.56	112,749.04
16	39,215.77	97,967.27	137,183.04
17	40,102.06	96,582.78	136,684.84
18	39,373.31	99,745.42	139,118.73
20	38,318.22	94,844.71	133,162.93
21	52,753.37	71,304.73	124,058.10
22	48,572.77	70,520.64	119,093.41
23	49,749.07	88,294.91	138,043.98
24	47,044.26	79,915.93	126,960.19

46 *United States Nat. Bank of Centralia et al.*

Date.	Cash on Hand.	Due From Reserve Agents.	Total Cash on Hand and Due From Reserve Agents.
25	48,230.03	104,245.33	152,475.36
27	53,193.31	94,709.56	147,902.87
28	54,409.25	46,082.48	100,491.73
29	54,868.35	41,199.88	96,068.23
30	62,856.47	33,709.60	96,566.07
31	55,120.78	26,426.74	81,547.52
Aug. 1	52,897.11	52,446.79	105,343.90
3	53,676.07	35,493.33	89,169.40
4	52,488.89	28,387.56	80,876.45
5	57,026.65	22,802.74	79,829.39
6	54,394.84	27,346.48	81,741.32
7	60,942.33	39,914.66	100,856.99
8	49,805.07	50,011.62	99,816.69
10	33,805.63	39,726.39	73,532.02
11	42,103.36	46,907.32	89,010.68
12	41,101.94	64,157.21	105,259.15
13	41,177.22	104,845.38	146,022.60
14	48,392.15	99,144.19	147,536.34
15	43,623.74	99,641.98	143,265.72
17	65,309.55	109,749.51	175,059.06
18	72,007.07	87,264.41	159,271.48
19	71,201.48	70,989.16	142,190.64
20	70,072.32	75,349.47	145,421.79
21	70,021.49	87,840.82	157,862.31
22	68,981.04	73,587.03	142,568.07
24	63,182.64	102,267.33	165,449.97
25	61,152.63	93,298.06	154,450.69
26	63,191.11	96,694.00	159,885.11
27	63,484.19	90,453.29	153,937.48
28	64,255.24	88,013.81	152,269.05
29	66,120.40	89,096.21	155,216.61

[41]

Exhibit 1 Continued.

(Testimony of Ernest G. Shorrock.)

Date.	Cash on Hand.	Due From Reserve Agents.	Total Cash on Hand and Due From Reserve Agents.
Aug. 31	74,524.60	72,576.26	147,100.86
Sept. 1	74,295.94	61,487.22	135,783.16
2	62,389.12	79,908.15	142,297.27
3	82,992.88	65,826.90	148,819.78
4	77,136.08	65,030.33	142,166.41
5	96,071.92	79,045.54	175,117.46
8	89,695.34	75,804.94	165,500.28
9	84,572.75	68,075.17	152,647.92
10	82,537.85	63,970.37	146,508.22
11	47,881.75	64,639.57	112,521.32
12	38,277.66	69,792.00	108,069.66
14	61,538.79	55,340.97	116,879.76
15	47,211.41	65,429.64	112,641.05
16	31,439.28	40,532.70	71,971.98
17	23,527.86	45,613.94	69,141.80
18	31,983.86	43,174.42	75,158.28
19	32,439.44	46,052.32	78,491.76

(Plaintiff's Exhibit No. 1, filed July 6, 1915.)

[42]

The witness, continuing, corrected a previous statement as follows: That the lowest amount in reserve banks was on August 5th, of \$22,802.74 instead of \$39,000.00. That does not change the result of the \$69,000 to any extent in the defendant bank and the reserve banks.

The witness on redirect examination testified that he had found from an examination of the bank's books that the earnings of the bank between and including July 13th and September 19th, 1914, exceeded the expenses and losses in the sum of \$880.58.

(Thereupon plaintiff introduced in evidence an

(Testimony of Ernest G. Shorrock.)

ordinance of the City of Centralia under which the bonds that were delivered to the United States National were authorized. This was received as Plaintiff's Exhibit Number 2, but has already been referred to in the testimony of J. W. Daubney as exhibit number 1. This confusion of exhibits arose by reason of the fact that the Daubney testimony was given at a preliminary hearing of this action, and by stipulation between the parties, was utilized on final hearing.)

Plaintiff then read in evidence the testimony of George B. Mason which had been given upon the preliminary hearing on behalf of the defendant, which in substance, was as follows: He had lived in Centralia for eight years and had been city treasurer for about six, his term expiring in December, 1914. The United States National Bank had been named as a city depository, and he made his deposits there accordingly. They had a \$10,000 bond up. The deposits of the various city funds were not segregated in the bank account, but the city treasurer's books would show what money was in each fund. One account was carried with the United States National as "G. B. [43] Mason, city treasurer, special account," not as a special deposit but as a special account which was for refunding certain city warrants. There was a thousand dollars which has been deposited with the United States National for several years, and then there was a deposit in July, being the proceeds [44] of \$52,500.00 of water bonds. The witness guessed that it was \$50,911.88.

Witness had received interest of two per cent upon this deposit since July. He had no deposit slip showing the deposit, and no pass-book except one relating

(Testimony of Ernest G. Shorrock.)

to the special account only. He did not have a pass-book. The pass-book for the special account, which showed a balance of \$2,638.31, was then introduced in evidence as Defendant's Exhibit "E."

Witness testified that the city had received from the bonding company \$10,000.00 covering the account that it had with the United States National Bank, which was furnished to secure the city's deposits with that bank.

Defendant then offered in evidence a check of \$4,700.11 against the G. B. Mason special account, which the witness testified was the ordinary form of check he used against that account. [45]

Witness on cross-examination by plaintiff, testified that he never received any bond or any other security from the United States National except this \$10,000.00. He stated that he delivered 105 water bonds to the United States National Bank, with draft drawn on Carstens & Earles for the amount. He could not state the exact amount of the draft. They were delivered to the bank for collection. This money was to be used for the construction of a gravity water system and the bank knew at the time they were delivered the purpose for which they were devoted. The witness got notice that the collection had been made on July 21st. When he was notified of this collection he asked that the bank give him a bond to secure the city for the deposit. It was not given but the bank told him they would do so. No other bond than the \$10,000.00 was ever furnished. The bonds were left with the United States National for the purpose

(Testimony of Ernest G. Shorrock.)

of collecting and crediting his account. The witness had no pass-book and the only evidence of the collection of the \$50,911.88 was that he went down to the bank and they told him, which was the only knowledge he had about the collection or credit of that amount. There was an additional thousand dollars with the United States National which was deposited as general funds of the city. All of these three accounts, however, were subject to check. The bank paid him interest on the \$50,911.88 account. This payment was by cashier's check.

(Plaintiff then introduced in evidence the resolution of the City of Centralia, designating the United States National Bank of Centralia as depository in an amount of not exceeding \$10,000.00. This was marked exhibit 3, which said exhibit is as follows:) [46]

Plaintiff's Exhibit No. 3—Resolution of City of Centralia.

“On motion City Treasurer was instructed to designate the U. S. Nat'l Bank, Field and Lease, Bankers, the Farmers and Merchants Bank and the Union Loan & Trust Bank as Depositories of the funds of the City of Centralia, in an amount not exceeding the sum of \$10,000.00 for each of said banks, upon their compliance with Chapter 22 of the laws of 1907, as amended by chapter 40 of the laws 1909, each of said banks so far as possible to be the depository for one fourth of the funds deposited by said City.”

(Plaintiff's Exhibit No. 3, filed July 6, 1915.)

The witness testified that he never drew a check against said sum or drew a cent of the said \$50,911.88 out of the bank; that he never received any municipal bonds, warrants or other security of any character for the bank other than said bond of \$10,000, during the time he was City Treasurer and during all the times covered by the deposits referred to in this case that he and the defendant bank never entered in to any written contract to pay interest; that he never saw or heard of any such contract; that there was an original issue of \$300,000, of water bonds; that the 105 bonds delivered to the defendant bank of \$500, each, aggregating \$52,500, had been sold to Carstens & Earles; that the proceeds of the bonds were to be used for the construction of a gravity water system, and that they could not be used for any other purpose; that he never intended to deposit the money (the proceeds of said bonds) in the defendant bank without a bond."

[47]

Testimony of L. Mabel Lee, for Plaintiff.

L. MABEL LEE, a witness on behalf of plaintiff, testified that she was the clerk of the City of Centralia and had been such since January, 1912. She stated that under the ordinance authorizing the purchase and construction of a gravity water system, there had been an election and said election was carried in favor of the bond issue. The total of the bond issue was \$300,000. The \$52,500.00 involved in this litigation was the last of that issue. They were sold a little below par.

The witness stated that she was familiar with

(Testimony of L. Mabel Lee.)

Local Improvement District Number 32 of the city as far as it related to her department. There were two warrants, 82 and 89, outstanding against that district for \$1330.00 and \$6639.00 respectively.

Thereupon it was admitted by all parties that the money to pay these warrants had been collected by the city prior to February, 1914.

These two warrants were issued against Local Improvement District Number 32. They were issued to the contractors who were performing the work on that district, and in part payment for their services. The cost of this improvement was assessed against the benefited property in a special district. This improvement district allowed payment to be made either in cash or in time, extending over a period of ten years with an annual payment; that pending the payment of assessment roll and the payment of cash thereunder, these warrants, 82 and 89, were issued to the contractor on monthly estimates; that as soon as cash was collected in the improvement district, Number 32, these two warrants became automatically called. The collection on this improvement district [48] had been between eleven and twelve thousand dollars, and only fifteen hundred dollars remained uncollected. During this period of time the City of Centralia kept money on deposit in the Field & Lease Bank of Centralia and for part of the time in the Farmers & Merchants Bank. G.B. Mason was city treasurer until 1914. He was succeeded by one Boren.

(Testimony of L. Mabel Lee.)

At the time of the failure of the United States National Bank, the city had money on deposit with the Union Loan & Trust Company and with Field & Lease. This deposit with Field & Lease at that time amounted to \$10,000.00. \$9,000.00 of this was used to pay interest on water bonds and the balance of one thousand paid interest on funding bonds. The city has received \$20,000.00 from a bonding company to cover deposits in the United States National Bank and the Union Loan & Trust Company. The city has also received three dividends to the amount of forty per cent of the original deposit, less \$20,000.00 collected from the bonding company on the deposit with the Union Loan & Trust Company. The city has received no money from the United States National Bank except the \$10,000.00 paid by the bonding company. The moneys received by the city from the defunct banks and from the bonds securing the deposits in those banks, was as follows: \$25,000.00 of the surety bonds was used to take up the gravity system warrants and \$5,000.00 was deposited to the credit of the light fund, which money was used immediately on its receipt on October 13th and November 10th, 1914.

The first dividend (witness did not state from where) was \$11,682.82, which went to take up \$11,000.00 and interest of electric light bonds the first of March, 1915. The second dividend (from where it did not appear), was appropriated [49] March 13th, 1915, to the electric light fund. This dividend was \$5,841.41. The third dividend (from where it did

(Testimony of L. Mabel Lee.)

not appear), on May 25th, was appropriated to various funds, all of which has been spent. So far as the witness knew, there was no money remaining in the treasury of the city which came out of defunct banks or from bonds which were put up to secure deposits with such banks, and there was no money in the treasury of the city which was in the Field & Lease bank, or any cash at that time (when, does not appear) which has not been spent. As far as the witness knew, the city had no money which was either in any defunct bank or with Field & Lease.

On cross-examination the witness testified that the city had collected money under Local Improvement District Number 32; that the city had on deposit with Field & Lease \$10,000.00 on September 21st, 1914. She did not know what had been there since that time. The city never segregated moneys under Local Improvement District Number 32 from moneys in its general deposit. The \$10,000.00 with Field & Lease paid interest on the funding bonds and the water bonds. This was done because it was expedient to do so and necessary for the city to meet it. In the handling of the various city funds, it was always a matter of expediency to meet expenses which were pressing and there had been loans and appropriations from one trust fund of the city to other trust funds; that moneys collected by the city in its general capacity, or acting on its special fund were all deposited as a whole, and there was no means of distinguishing one fund from the other except on the books of the city. If \$5,000.00 came

(Testimony of L. Mabel Lee.)

[50] in through electric light fund and \$5,000.00 through general taxation, it would all be placed in one general credit to the city or it might be split up as the treasurer saw fit in the various banks. When the city received three dividends on the Union Loan & Trust Company account, it was appropriated to a certain local improvement district because it was necessary to meet the payment of that fund, and was so appropriated as a matter of expediency.

It thereupon was admitted by counsel on both sides that collections on Local Improvement District Number 32 had been made in such amounts as to pay warrants Number 82 and Number 89 respectively, prior to February 10th, 1914.

Testimony of Frank A. Hill, for Plaintiff.

FRANK A. HILL, a witness for the plaintiff, testified that he was assistant and accountant to the receiver of the bank. A partial list of local improvement fund warrants of the City of Centralia which had come into the hands of the receiver and which had been called at the time of the receivership, were as follows: No. 340, \$1.50; No. 338, \$4.35; No. 335, \$21.25; No. 327, \$100.00; No. 355, \$10.93; No. 356, \$3.12; No. 339, \$7.50; No. 349, \$100.00; No. 363, \$14.37; No. 364, \$7.50; No. 365, \$7.50; No. 366, \$15.00; No. 368, \$74.60; No. 369, \$74.60.

Witness stated that this was only a partial list which he had with him; that there were some local improvement bonds also of the City of Centralia, the denominations of which he could not remember,

(Testimony of Frank A. Hill.)

but these bonds, together with the warrants above enumerated, together with warrants Number [51] 89 and Number 82 previously discussed, had come into the hands of the receiver of the bank.

**Testimony of E. G. Shorrock, for Plaintiff
(Recalled).**

E. G. SHORROCK, recalled as a witness for the plaintiff, testified that the lowest amount of money that was in nonreserve banks of the defendant bank between and including July 13th and September 19th, 1914, was described on the books as sundry banks and bankers and was \$10,938.18, which was on August 29, 1914; that the lowest amount of cash on hand and due from reserve banks and from banks not reserve was on September 17th, 1914, the total of which was \$84,089.19. The Centralia bank books showed that on July 13th, 1914, debits to the National Bank of Commerce of Seattle were as follows: Collection No. 5470, \$180.11; collection No. 5472, \$50,911.88, and an item described as sundries, \$4,416.59, the total of these being \$55,508.58.

The witness stated that the United States National Bank deposited with the National Bank of Commerce during the respective dates herein shown, during the year 1914, as follows: July 13th, \$55,508.58; July 14th, \$3,032.97; July 15th, \$27,072.18; July 15th, \$20,866.92; July 17th, \$1,930.34; July 18th, \$2,974.88; July 20th, \$4,256.16; July 21st, \$1,806.09; July 22d, \$5,755.42; July 23d, \$34,236.10; July 24th, \$12,323.63; July 25th, \$6,885.47; July

(Testimony of Ernest G. Shorrock.)

27th, \$4,854.29; July 28th, \$2,598.98. That the total deposits up to and including July 28th, 1914, was \$184,102.01.

It was conceded that the United States National Bank account with the National Bank of Commerce was overdrawn [52] on July 28th, 1914, but it was not admitted that there was an overdraft prior to that date.

Witness testified that there was a transfer from the National Bank of Commerce to the Bank of California between and inclusive of July 13th and July 28th of \$62,500 and a transfer to the Continental & Commercial National Bank of Chicago of \$20,000.00, and a transfer to the Bank of Italy of \$15,000.00. Witness could find no other transfers to other banks. On July 15th, 1914, the National Bank of Commerce was credited by the Centralia bank with \$12,225.00 which comprised three items as follows: July 13th, \$3,610.00; July 15th, \$4,870.00 and \$3,745.00. As far as the witness could ascertain, these items represented notes which were sent by the Bank of Commerce to the Centralia bank for collection.

It was admitted that these three notes, as so testified to, were sent by the National Bank of Commerce of Seattle to the United States National for collection, and that the United States National's account with the National Bank of Commerce was charged by the National Bank of Seattle with the amount thereof, and that the United States National credited a like sum on its books to the National Bank of Commerce. [53]

(Testimony of Ernest G. Shorrocks.)

“Mr. PILES.—I will ask the witness this: Q. The account of the National Bank, or the amount of money shown by these books to have been in the National Bank of Commerce of Seattle was reduced on the dates you mentioned by \$12,225?

A. Yes, sir.”

Witness testified that he had a statement which showed transfers of moneys from the various banks that the Centralia bank was doing business with which covered four typewritten pages, and contained some two hundred items. The first column shows the date of the transfer; the second column shows the bank from which the transfer was made; the third column shows the bank to which the transfer was made, and the fourth column shows the amount transferred. This dealt with all the banks, including reserve and nonreserve banks. [54]

Over objection the Court admitted this statement in evidence as Plaintiff's Exhibit Number 4, the purport of which was to show that transfers were being made of credits from one correspondent bank to another by the United States National, which said exhibit as follows. [55]

Plaintiff's Exhibit No. 4—Detail of Bank Transfers.

DETAIL OF BANK TRANSFERS.

July 13, 1914, to September 19, 1914.

DATE.	BANK FROM.	BANK TO.	AMOUNT.
1914.			
July 13	Cont. & Comm. N. B., Chicago	State Bank of Tenino	4,000.00
13	Bank of Commerce, Seattle	Bank of Cal., Tacoma	10,000.00
14	do	Continental & Comm. N. B., Chicago	10,000.00
14	do	Bank of Cal., Tacoma	7,500.00
15	do	Cont. & Comm. Nat'l Bank, Chicago	10,000.00
15	Seattle National Bank	Chase Nat'l., N. Y.	3,000.00
15	Bank of Commerce, Seattle	Bk. of Cal., Tacoma	10,000.00
15	1st Nat'l Bank, San Frans.	Nat'l Bank of Com- merce, Seattle	5,000.00
15	N. W. Nat'l Bk, Minne- apolis	do	5,000.00
16	Bank of Italy, San Frans.	do	15,000.00
16	First National, Portland	Bk. of Cal., Tacoma	5,000.00
17	N. W. Nat'l Bk., Portland	1st Nat'l., San Frans.	5,000.00
20	Chase National, New York	Nat'l City, New York	
		% Winlock Bank	1,500.00
21	N. W. Nat'l Bank, Minne- apolis	Seattle Nat'l Bank	3,000.00
	First Nat'l., Portland	Bank of Cal., Tacoma	5,000.00
	Nat'l Bank of Commerce, Seattle	do	2,500.00
22	do	do	5,000.00
23	First National, Portland	do	5,000.00
	Nat'l Bank of Commerce	do	15,000.00
	do	Bank of Italy	15,000.00
	Bank of Cal., Tacoma	Willapa Harbor Bank	5,000.00
	Continental & Commercial Nat'l Bank, Chicago	Nat'l Bk of Commerce	10,000.00
	N. W. Nat'l Bank, Minne- apolis	do	5,000.00
	do	First Nat'l Bk. Fargo	1,500.00
	First Nat'l, San Francisco	State Bank of Tenino	1,000.00
	Bank of Italy	Cont. & C. Nat'l, Chicago	7,500.00

60 *United States Nat. Bank of Centralia et al.*

DATE.	BANK FROM.	BANK TO.	AMOUNT.
1914.			
24	do	Nat'l Bank of Comm., Seattle	10,000.00
	National Bank of Commerce	Bank of Cal., Tacoma	5,000.00
	Cont. & Comm. Nat'l Bank, Chicago	Bank of Commerce, Seattle	5,000.00
	N. W. Nat'l Bk, Minne- apolis	do	5,000.00
25	do	State Bank of Tenino	500.00
	Cont. & Comm. Nat'l, Chicago	Chase Nat'l, N. Y.	3,500.00
	First Nat'l, Portland	Merchants Nat'l Port- land	1,000.00
	Nat'l Bank of Commerce	Bank of Cal., Tacoma	5,000.00
	Cont. & Comm. Nat'l, Chicago	Nat'l Bk of Commerce	5,000.00
27	do	State Bank of Tenino	800.00
28	First Nat'l, Portland	Bk. of Cal., Tacoma	5,000.00
	do	Merchants Nat'l, Port- land	3,000.00
[56]			
Aug. 12	Nat'l Bank of Commerce	State Bank Tenino	1,000.00
	do	Bank of Calif. Tacoma	5,000.00
	N. W. Nat'l Bk, Minne- apolis	Nat'l Bk. of Commerce	2,500.00
13	Chase National New York	1st Nat'l, S. F.	5,000.00
	Nat'l Bank of Commerce	Bank of Cal., Tacoma	1,500.00
	do	Chase Nat'l New York	5,000.00
14	1st Nat'l Portland	Bank of Cal., Tacoma	2,500.00
	Nat'l Bank of Commerce	do	2,500.00
	N. W. Nat'l Bk, Minne- apolis	Merchants Nat. Port- land	500.00
15	Nat'l Bank of Commerce	Willapa H. S. Bk. Ray- mond	2,000.00
	1st National Portland	Nat'l Bank of Com- merce	2,500.00
	National Bank Commerce	Bk. of Cal., Tacoma	5,000.00
	N. W. Nat'l Bk, Minne- apolis	Nat'l Bank Commerce	5,000.00

vs. The City of Centralia.

61

DATE.	BANK FROM.	BANK TO.	AMOUNT.
1914.			
17	Nat'l Bank Commerce	Bk. of Cal., Tacoma	5,000.00
	Cont. & Comm. N. B.		
	Chicago	State Bank of Tenino	700.00
18	1st Nat'l Bank Portland	N. W. Nat'l Portland	1,500.00
	do	Nat'l Bank Commerce	5,000.00
	do	Bank of Cal. Tacoma	5,000.00
	National Bank Commerce	do	5,000.00
	N. W. Nat'l Bk, Minne-		
	apolis	Nat'l Bank Commerce	5,000.00
	Willapa H. S. Bk Raymond	U. L. & T. Co., Cen-	
		tralia	3,500.00
19	1st Nat'l Portland	Bank of Cal., Tacoma	7,500.00
	National Bank Commerce	do	5,000.00
	N. W. Nat'l Bk, Minne-		
	apolis	Nat'l Bk of Commerce	5,000.00
20	1st National Portland	Bk. of Cal., Tacoma	5,000.00
	Nat'l Bank Commerce	U. L. & T. Co., Cen-	
		tralia	1,500.00
	N. W. Nat'l Bk, Minne-		
	apolis	1st Nat'l Bk., Portland	2,000.00
	Olympia B. & T. Co.	National Bk Commerce	2,000.00
	Nat'l Bank of Commerce	State Bank Tenino	1,500.00
	W. H. S. Bank Raymond	U. L. & T. Co. Cen-	
		tralia	6,000.00
	Union L. & T. Co. Centralia	State Bank of Tenino	1,500.00
21	Chase National New York	1st Nat'l Portland	3,000.00
	1st Nat'l Portland	Bank of Cal., Tacoma	5,000.00
	do	N. W. Nat'l Portland	1,500.00
	Nat'l Bank Commerce	Bank of Cal., Tacoma	5,000.00
	Cont. & Comm. Nat'l		
	Chicago	1st Nat'l Portland	4,000.00
	Olympia B. & T. Co.	Bank of Cal., Tacoma	5,000.00
	do	Nat'l Bank of Com-	
		merce	15,000.00
22	Nat'l Bank of Commerce	State Bank of Tenino	2,500.00
	Chase Nat'l New York	1st Nat'l Portland	3,000.00
	1st Nat'l Portland	Bank of Cal., Tacoma	5,000.00
	do	N. W. Nat'l Portland	1,000.00
	Cont. & Comm. Nat'l		
	Chicago	1st Nat'l Portland	3,000.00

62 *United States Nat. Bank of Centralia et al.*

DATE.	BANK FROM.	BANK TO.	AMOUNT.
1914.			
24	Willapa Harbor State Bank	Nat'l Bank of Comm.	10,000.00
	Chase Nat'l New York	do	5,000.00
	1st Nat'l Portland	Union L. & T. Co.	2,000.00
	N. W. Nat'l Bank Minne- apolis	1st Nat'l Portland	4,000.00
25	Nat'l Bank of Commerce	Olympia B. & T. Co.	15,000.00
	Olympia B. & T. Co.	Nat'l Bank Commerce	12,500.00
	Seattle National Bank	N. W. Nat'l Bk., Minneap.	2,500.00
	1st Nat'l, Portland	Bank of Cal., Tacoma	5,000.00
26	do	do	5,000.00
	do	N. W. Nat'l Bk., Port- land	1,000.00
	Nat'l Bank of Commerce	Olympia Bk & T. Co.	1,000.00
	N. W. Nat'l Bank Minne- apolis	1st Nat'l Portland	2,500.00
	Olympia B. & T. Co.	Nat'l Bank Commerce	3,795.00
	Seattle National Bank	State Bank Tenino	1,500.00
[57]			
Aug. 27	Willapa Harbor State Bank	Chase National	5,000.00
	Olympia B. & T. Co.	Nat'l Bank Commerce	2,000.00
	Seattle National Bank	State Bank Tenino	2,000.00
	1st National Portland	Bank of Cal., Tacoma	5,000.00
	Cont. & Comm. Nat'l Chicago	1st National Portland	5,000.00
	N. W. Nat'l Bank Minne- apolis	1st National Portland	2,500.00
28	Nat'l Bank Commerce	Bank of Cal., Tacoma	5,000.00
29	Seattle National Bank	N. W. Nat'l Bk., Minneap.	2,000.00
	Capitol National Olympia	1st National Portland	5,000.00
31	Seattle National Bank	Cont. & Comm. Nat'l Chicago	3,000.00
	N. W. N. Bk. Minneapolis	Union L. & T. Co. Cen- tralia	5,000.00
Sep. 1	Olympia B. & T. Co.	Bank of Cal., Tacoma	2,000.00
	do	do	4,000.00
	Nat'l Bank of Commerce	do	5,000.00
	Cont. & Comm. Nat'l Bank Chicago	U. L. & T. Co. (1st Nat'l Portland)	5,000.00
	Willapa H. S. Bk. Raymond	Bank of Cal., Tacoma	10,000.00

vs. The City of Centralia.

63

DATE.	BANK FROM.	BANK TO.	AMOUNT.
1914.			
2	N. W. Nat'l Bk. Minne- apolis Seattle National Bank	W. C. S. Bk. Decorah N. W. N. Bk. Minne- polis	2,500.00 5,000.00
3	Seattle National Bank National Bank of Tacoma National Bank Commerce	Union L. & T. Co. Cen- tralia do Farmers & Merchants Bank Centralia	5,000.00 3,500.00 8,000.00
	Cap. Nat'l Bank Olympia	Nat'l Bank Commerce	2,000.00
4	Seattle National Bank National Bank Commerce	State Bank Tenino Farmers & Merchants Bank Centralia	1,500.00 4,000.00
	Cont. & Comm. Nat'l Chicago	U. L. & T. Co. Cen- tralia	2,000.00
	N. W. Nat'l Bk, Minne- apolis do	do Seattle National Bank	3,000.00 2,000.00
5	Willapa H. St. Bank Ray- mond	National Bank Comm.	15,000.00
8	1st Nat'l Portland Nat'l Bank of Commerce	N. W. Nat'l Portland Farmers & Merchants Bank Centralia	500.00 9,200.00
	do	do	4,300.00
	N. W. Nat'l Bk, Minne- apolis Olympia B. & T. Co.	Union L. & T. Co., Cen- tralia Nat'l Bank Commerce	6,000.00 5,000.00
10	Cont. & Comm. Nat'l Chicago	Union L. & T. Co., Cen- tralia	2,500.00
11	Nat'l Bank of Tacoma Cap. Nat'l Olympia do	1st Nat'l San Frans. Seattle Nat'l Bank Union L. & T. Co., Centralia	1,500.00 1,500.00 1,500.00
12	do	do	5,000.00
14	Cont. & Comm. Nat'l Chicago Cap. Nat'l Olympia Bank of Calif. Tacoma	Union L. & T. Co., Nat'l Bk of Tacoma Union L. & T. Co.,	2,500.00 5,000.00 5,000.00

64 *United States Nat. Bank of Centralia et al.*

DATE.	BANK FROM.	BANK TO.	AMOUNT.
1914.			
15	Nat'l Bank of Tacoma	Union L. & T. Co.	1,500.00
	Union L. & T. Co.	Olympia B. & T. Co.	24,050.00
	Cap. Nat'l Olympia	N. W. & N. Bk. Minne- apolis	6,000.00
16	Nat'l Bank of Tacoma	Union L. & T. Co.	3,000.00
17	State Bank Tenino	Nat'l Bank Tacoma	1,152.60
	Cap. Nat'l Olympia	do	9,000.00
18	Cap. Nat'l Olympia	Union L. & T. Co.	1,000.00
19	do	Nat'l Bank of Tacoma	7,500.00
	do	Chase National	6,500.00

(Plaintiff's Exhibit No. 4, filed July 7, 1915.)

[58]

Witness stated that he had prepared a further statement showing the account of the United States National with the Bank of California of Tacoma from July 12th, 1914, to July 20th, 1914, as shown on the books of the United States National. This statement was also introduced in evidence and marked Plaintiff's Exhibit Number 5, the purport of which was to show by date and items the amount of deposits by the United States National with the Bank of California and the withdrawals and the daily balances between those dates. A similar statement had been prepared by the witness concerning the United States National Bank's account with the Continental & Commercial Bank of Chicago between the dates of July 11th and August 6th, 1914, which statement was admitted as Plaintiff's Exhibit 6, which said exhibits are as follows: [59]

Plaintiff's Exhibit No. 5—Bank Account.

ACCOUNT WITH THE BANK OF CALIFORNIA, TACOMA, WASH.,
JULY 12TH, 1914, TO JULY 20TH, 1914.

DR.				Dr.
Date.		Details.	Total.	Balances.
July 11	Balance			4,909.34
13	Remittance Nat. Bk. of Commerce	10,000.		
	Remittance Sundries	4,237.95	14,237.95	
14	do Nat. Bank of Commerce	7,500.00		
14	Remittance Sundries	1,193.94	8,693.94	
15	do Nat. Bank of Commerce	10,000.		
	Remittance Sundries	5,270.84	15,270.84	2,195.46
16	do	20,308.56	20,308.56	11,541.37
17	do	3,433.65		
	Error remittance 7/15	.02	3,433.67	7,093.09
18	Remittance	6,633.53	6,633.53	6,103.43
20	Remittance	1,251.57	1,251.57	

#5000.00 of this amount was transferred to this bank on July 16, 1915, from First N. B., Portland.

				Cr.
Date.		Details.	Totals.	Cr. Balances.
July 13	Remittances 7/11	510.84		
	Check returned #7839	10.		
	Sundry drafts	5,093.35		
		19,939.44	25,553.63	6,406.34
14	Remittances	1,296.07		
	Sundry drafts	9,154.68	10,450.75	8,163.15
15	Remittances	449.95		
	Sundry drafts	4,462.28	4,912.23	
16	Remittances	250.36		
	Exchange	.40		
	Sundry drafts	10,711.89	10,962.65	
17	Check returned	158.26		
	Remittance	2,832.67		
	Exchange	.20		
	Sundry drafts	4,890.82	7,881.95	
18	Remittance	2,913.58		
	Sundry drafts	4,709.61	7,623.19	
20	Remittance 7/18	3,109.81		
	Sundry drafts	12,486.73	15,596.54	8,241.54

(Plaintiff's Exhibit No. 5, filed July 7, 1915.)

Plaintiff's Exhibit No. 6—Bank Account.ACCOUNT WITH CONTINENTAL AND COMMERCIAL NAT. BANK,
CHICAGO, JULY 12TH, 1914, TO AUG. 6TH, 1914.

DR. Date.		Detail.	Total.	Dr. Balances.
July 11	Balance			17,080.95
13	Remittances Sundries from Nat. Bk.	1,272.30	1,272.30	8,751.86
14	Remittance of Commerce do Sundries	10,000. 555.61	10,555.61	19,257.92
15	do From Nat. Bk. of Commerce	10,000.00		22,718.11
	Remittance Sundries	949.94	10,949.94	
16	do do	791.05	791.05	23,482.61
17	do do	518.00	518.00	23,852.87
18	Atchinson	3,000.	3,000.00	26,502.42
20	Remittance Sundries	517.07	517.07	26,409.93
21	do do	53.64	53.64	26,263.57
22	Atchinson	2,000.		
	Remittance Sundries (From Bank of	1,501.62	3,501.62	29,135.07
23	San Frans. (Italy	7,500.00		
	Remittance—Re-discounts	15,844.06		
	do Sundries	2,010.75	25,354.81	34,197.65
24	do do	233.13		
	Collection	210.	443.13	27,090.78
25	Remittance Sundries	1,448.26	1,448.26	19,039.59
27	do do	460.79	460.79	18,397.17
28	do do	368.51	368.51	18,745.68
30	do do	75.37		
	Atchinson	2,000.00	2,075.37	6,101.50
				5,669.67
				4,102.72
Aug. 3	Remittance Sundries	2,580.15		1,373.32
				3,587.44
		Accepted By.	Due.	
#13889	Walville Lumber Co.	Eastern R. R. & Lbr. Co.	10/13/14	3,750.00
13893	Walville Lumber Co.	do do	10/15/14	4,760.00
13578	Walville Lumber Co.	Silver Mill Co.	9/29/14	3,907.09
13762	Walville Lumber Co.	Cram Lumber Co.	9/26/14	3,426.97
				<hr/> 15,844.06

DR.				Dr.
Date.		Detail.	Total.	Balances.
Aug. 4	Remittance Sundries	1,087.11	1,087.11	4,605.91
5				3,329.48
6	Atchinson	5,000.		
6	Remittance	952.67	5,952.67	

	Date.		Details.	Total.	Cr. Balances.
July 13	Remittance 7/18		360.46		
	do 7/9		27.83		
	Tenino-Tel. Transfer		4,000.00		
	Coll. L. 7/1		5,000.00		
	Sundry drafts		213.10	9,601.39	
14	Remittance 7/11		49.55	49.55	
15	Coll.		4,950.		
	Coll.		2,500.		
15	Sundry drafts		39.75	7,489.75	
16	Exchange		.60		
	Remittance		4.40		
	Sundry drafts		21.55	26.55	
17	Remittance 7/14		130.49		
	Sundry drafts		17.25	147.74	
18	Remittance		63.25		
	Sundry drafts		287.20	350.45	
20	Sundry drafts		54.75		
	Coll. 17808		10.		
	Remittance 7/15		120.42		
	do 7/16		16.17		
	do 7/16		259.07		
	do 7/16		28.08		
	do 7/17		121.07	609.56	
21	Sundry drafts		200.	200.	
22	do do		14.89		
	Remittance 7/18		115.23		
	Tenino Tel. Transfer		500.	630.12	
23	Re-discounts		10,000.		
	Nat. Bk. of Commerce		10,000.		
	Sundry drafts		292.23	20,292.23	
24	Blumauer		2,500.		
	Nat. Bk. of Commerce		5,000.		
	Sundry drafts		50.	7,550.	
25	Remittance 7/21		500.88		
	do 7/21		23.31		
	Nat. Bk. of Commerce		5,000.		
	Sundry drafts		475.26		
	Trans. by Tel. from Chase				
	Nat. N. Y.		3,500.00	9,499.45	

68 *United States Nat. Bank of Centralia et al.*

(Testimony of Ernest G. Shorrocks.)

Date.		Detail	Total.
July 27	Remittance 7/23	53.88	
	Transferred to Tenino	800.00	
	Remittance 7/24	131.83	
	Sundry drafts	117.50	1,103.21
28	do do	20.	20.
29	Remittance 7/25	481.49	
	1st. Nat. Bk. Portland	10,000.	
	Sundry drafts	2,162.69	12,644.18
30	do do	2,507.20	2,507.20
31	Remittance 7/23	189.85	
	do 7/27	991.67	
	do 7/28	309.93	
	Wire	.50	
	Sundry drafts	75.00	1,566.95
Aug. 1	Nat. Bk. of Commerce	2,500.	
	Sundry drafts	229.40	2,729.40
3	Remittance 7/29	87.31	
	Exchange	.80	
	Sundry drafts	277.92	366.03
4	Remittance 7/31	16.89	
	Sundry drafts	51.75	68.64
5	Remittance 8/1	11.00	
	Telegram	.56	
	Transferred to Tenino	750.00	
	Sundry drafts	514.87	1,276.43
6	Remittance 8/3	271.85	
	1st Nat. Bk. Portland	10,000.	
	Sundry drafts	357.69	10,629.54
			1,347.39

(Plaintiff's Exhibit No. 6, filed July 7, 1915.)

[63]

On cross-examination the witness testified that at the time of the deposit with the National Bank of Commerce of the collection from the Carstens & Earles bonds, there was also deposited further items of \$180.11 and \$4,416.59 by the United States National with the National Bank of Commerce, which was a remittance from the United States National Bank to the National Bank of Commerce. As to the transfer of credit of \$62,500.00 between July 13th and July 28th, from the National Bank of Commerce to the Bank of California of Tacoma, witness could

(Testimony of Ernest G. Shorroek.)

not state how that transfer was made. [64] The first of this transfer was on July 13th when a remittance was made from the National Bank of Commerce of Seattle to the Bank of California of \$10,000.00. After crediting the \$10,000.00 which was received in that transfer from the National Bank of Commerce to the Bank of California, the United States National's account with the Bank of California was overdrawn \$6,406.34. The next remittance or transfer that was made from the Seattle Bank to the Tacoma Bank, to the credit of the United States National, was on July 14th, and was an item of \$7500.00; that at the close of business on the 15th, on the day that the transfer was made from Seattle to Tacoma, it was a fact that after crediting the \$7500.00 so transferred, the United States National Bank of Centralia was still overdrawn with the Bank of California to the extent of \$8,163.15.

The next transfer from the Seattle bank to the Tacoma bank was on July 15th, of \$10,000.00 and there were no further transfers from the Seattle to the Tacoma account of the United States National, up to and including July 20th. There had been transferred up to July 20th, of the credit with the Seattle bank and the Tacoma bank of the United States National, of \$27,500.00, and at the close of business on July 20th, after all these transfers had been made and credited in the Tacoma bank, the United States National was still overdrawn in the Tacoma bank to the extent of \$8,241.54. On July 22d, 1914, the total transferred from the Seattle bank to the Tacoma bank, to the credit of the

(Testimony of Ernest G. Shorrock.)

United States National, was \$35,000 but at the close of business on July 22d, and after this transfer had been made to the bank in Tacoma, the United States National was still [65] overdrawn with the Tacoma bank to the extent of \$11,423.69.

As to the item of the three notes , amounting to \$12,225.00 which had been returned by the National Bank of Commerce to the United States National for collection, the witness was unable to tell what had been done with them and could not say whether they had ever been collected by the United States National or not. He had tried to trace them and could not, but that he had not examined the assets of the receiver to find what he had, that he (Receiver) may have had them, and he may not.

In regard to the account of the United States National with the Continental & Commercial of Chicago, witness' examination disclosed that this account was exhausted on August 6th, 1914, when the United States National had an overdraft at the Continental & Commercial of \$1347.39.

On redirect examination, witness stated that during the period covered by the accounts introduced in evidence, the United States National was transferring in general its funds from one reserve bank to another reserve bank, and that when there was an overdraft in one reserve bank, there was a surplus in another reserve bank, or other reserve banks, and that between these dates there was never a smaller amount in the Centralia Bank, and reserve banks than \$69,000.00. If the \$12,225 concerning

(Testimony of Ernest G. Shorrock.)

which I have testified had not been so credited, there would have been no overdrafts in the National Bank of Commerce on the 28th day of July.

On recross-examination, the witness testified that between July 13th and July 28th, which was the date of the overdraft of the United States National with the National Bank of Commerce, he did not want to be understood as saying that all of this credit was utilized by transfers of credits to other reserve banks; that the only amounts that he was able to trace into other reserve agents of the United States [66] National were those that he had already testified to as going to the Continental & Commercial of Chicago and the Bank of California in Tacoma, and an additional item of \$15,000.00 to the Bank of Italy on July 23d, which was a correspondent but not reserve bank of the United States National.

On redirect examination, witness testified that there were several other small collection items in addition to the \$12,225.00 concerning which he had already testified, to wit: On July 22d, a \$2,500.00 note of the Chester Snow Log & Shingle Company, and on July 23d sundry collection items aggregating \$417.52, and on July 28th, there were two collections of \$1,485.00 and \$1,584.00 respectively, which were all that he was able to find. The total of these items was \$5,986.52, all of which items were charged by the National Bank of Commerce to the account of the United States National, and credited by the Centralia Bank to the Bank of Commerce.

(Testimony of Ernest G. Shorrock.)

On recross-examination the witness testified that as to the note of \$2,500.00 of the Chester Snow Log & Shingle Company, under date of July 22d, he could not tell what had been done with it. He did not know whether it was collected or whether it was still in the bank.

Testimony of H. O. Johnson, for Plaintiff.

H. O. JOHNSON, a witness for the plaintiff, testified that he was a general bookkeeper in the National Bank of Commerce of Seattle; that he had the books showing the state of their account with the United States National; that on July 15th, 1914, there was a note of \$4,870.00, another one of \$3,745.00, [67] and another one of \$3,610.00, the total of which was \$12,225.00. On July 13th, and July 15th, the National Bank of Commerce got credit for these items by the United States National; it shows that they were paid.

“Q. And that is what the United States National Bank of Centralia sent you as evidence of the fact that these notes had been paid?

A. It is evidence of the fact they gave us credit for the collection.

The COURT.—Is it customary when you send collections to one bank to give you credit before the note is paid? A. They might do that, yes, sir.

Q. Is that the way your bank does-

A. I think they do. I am not in the note department, if they guaranteed the note to be paid.”

The witness testified that if a person guaranteed

a note, they would have to take it up whether it was paid or not. He did not know whether the United States National had guaranteed these notes. Witness stated if "A" deposited a thousand dollar note with him, the bank does not credit "A's" account unless "A" guarantees the payment of it. In such an instance, if a note was not paid, he would debit the account with the thousand dollars already credited; that that was the ordinary custom.

Plaintiff then introduced in evidence a notation of the National Bank of Commerce of Seattle, as follows:

Plaintiff's Exhibit No. 7—Notation of National Bank of Commerce of Seattle.

"To U. S. N/B Centralia, Wn.

Report by No.
55466.

Date Sent.	Payer.	Amount.	Due.	Endorser.
7/10	Eastern Ry. & Lbr. Co.	4870 3745	7/15	Note teller B. D. 96334-S. Jul. 16, 1914.

PAID

PRESIDENT'S OFFICE.

Jul. 15, 1914.

United States Nat. Bank
Centralia, Wash. [68]

PROTEST.

The favor or *prompt returns* is requested upon this
~~note~~

draft herewith enclosed for collection.

~~check~~

Do not credit until paid.

Deliver documents only upon payment.

If unpaid give full reason.

No protest unless otherwise instructed.

Respectfully.

THE NATIONAL BANK OF COMMERCE
OF SEATTLE.

(Endorsement on back:)

“Cause No. 25-E. United States District Court, Western District of Washington. City of Centralia, vs. U. S. Nat. Bank of Centralia, et al.

Plaintiff’s Exhibit No. 7. Filed in the U. S. District Court, Western District of Washington, Southern Division. Jul. 7, 1915. Frank L. Crosby, Clerk. By —————, Deputy.”

Plaintiff’s exhibit number 8 was thereupon introduced in evidence and is identical with exhibit number seven except that the amount is \$3,610.00, and is stamped “Paid, president’s office, July 13th, 1914, United States National Bank.”

Plaintiff then introduced in evidence exhibit number 9, which is a letter of July 10th, addressed to the National Bank of Commerce, Seattle, Washington, by J. W. Daubney, cashier of the United States National Bank, which enclosed for collection draft on Carstens & Earles, for \$50,911.88, together with a package of bonds. When collected, the letter asked the National Bank of Commerce to credit [69] the same to the account of the United States National, which said exhibit is as follows:

Plaintiff's Exhibit No. 9—Letter.

“No. 8756.

THE UNITED STATES NATIONAL BANK.

CAPITAL STOCK \$100,000.00

Chas. Gilchrist, Pres.

C. S. Gilchrist, V. Pres.

Geo. Dysart, V. Pres.

J. W. Daubney, Cashier.

Ross W. Daubney, Asst. Cashier.

H. F. Gilchrist, Asst. Cashier.

CENTRALIA, WASH.

July tenth.

Nineteen Fourteen.

National Bank of Commerce,

Seattle, Washington.

Gentlemen:—

We enclose herewith for collection, draft on Carstens & Earles, Inc., for \$50,281.88 and interest. We are sending this and also package of bonds amounting to \$52,500.00 herewith by special messenger.

Kindly deliver said bonds, together with affidavits or certificates attached to Carstens & Earles upon payment of draft, together with interest on \$52,500 from May 1st to date of payment, at the rate of 6% per annum.

When paid kindly credit same to our account and advise.

Very truly yours,

J. W. DAUBNEY,

Cashier.”

Enclosures.

(Plaintiff's Exhibit No. 9, filed July 7, 1915.)

On cross-examination, the witness testified that it was customary when a remittance sheet of checks was sent to credit the account before the checks were paid, and the receiving bank would send the correspondent bank a notice that the remittance had been paid, which would be a notification like Plaintiff's Exhibits 7 and 8. If the bank had been carrying a discount note for a correspondent bank, and did not desire to carry it any longer and returns it to the correspondent bank, it is customary for the sending bank to send notice of its receipt and a statement like Plaintiff's Exhibits 7 and 8 stamped "Paid."

Witness could not state what was done with these particular notes after being returned to the United States National.

As to the state of the account between the National Bank of Commerce and the United States National, the witness stated that the United States National's account with the National Bank of Commerce was overdrawn on July 11th, 1914, to the extent of \$11,071.64.

The next transaction between these banks was on July 13th when the Centralia bank made a deposit with the National Bank of Commerce including the \$50,911.88 in dispute, but after crediting the deposits so made on July 13th, the account between these banks showed a balance in favor of the United States National of \$37,409.59.

On July 22d, 1914, at the close of business, the United States National was overdrawn with his bank \$677.32.

Defendant then introduced in evidence exhibit "A," [71] which is a transcript of the state of account between these two banks taken from the books of the National Bank of Commerce.

Defendant's Exhibit "A"—Transcript of Account of Banks.

"TRANSCRIPT OF ACCOUNT OF UNITED STATES NATIONAL BANK OF CENTRALIA WITH NATIONAL BANK OF COMMERCE SEATTLE, AS SHOWN BY THE BOOKS OF THE NAT. BANK OF COMMERCE, SEATTLE, WASH.

Date.	Memo.	Items Charged to Account of U. S. Nat. Bank.	Balance Due U. S. Nat. Bank.	Balance Due Nat. Bank Com- merce or Overdraft of U. S. Nat. Bank.	Deposits Made By U. S. Nat. Bank.	Memo.
1914, L:L July						
11				11071.64.		
13	Note	3610.00			3777.78	L.11.
	10224	150.00			50911.88	L.10.
	239	17.64			200.00	L.11.
	244	25.50			180.11	L.10.
	252	223.82				
	R.	2561.58	37409.59			
14	253	9.40			4416.59	L.13.
	212	6.50				
	256	2865.61				
	55	10000.00				
	T. T. to C&C& Wire	10000.75				
	R	1477.98	17465.94			
15	Note	4870.00			10000.00	L.14.
	Note	3745.00			2832.97	L.14.
	Ret.	5.00				
	254	26.76				
	251	24.76				
	49	7.50				
	10260	7500.00				
	T. T. & Wire	10000.75				
	R.	3561.60	557.54			

78 *United States Nat. Bank of Centralia et al.*

Date.	Memo.	Items Charged to Account of U. S. Nat. Bank.	Balance Due U. S. Nat. Bank.	Balance Due Nat. Bank Com- merce or Overdraft of U. S. Nat. Bank.	Deposits Made By U. S. Nat. Bank.	Memo.
1914.						
16	258	3.65			4061.28	L. 15.
	57	24.40			10000.00	L. 15.
	63	49.15				
	59	100.10				
	64	10000.00				
	65	314.63				
	66	573.11				
	R.	593.11	2960.67			
17	69	82.00			195.67	L. 3.
	62	70.85			5866.92	L. 16.
	71	187.73				
	R.	2457.72	6224.96			
[72]						
18	10275	19.74			2873.90	L. 15.
	270	34.00			137.00	C. Cy. Rec'd at V
	267	300.00			1930.34	L. 17.
	231	10.00				
	261	840.00				
	277	37.50				
	278	1.69				
	R.	2291.86	7631.41			
20	10276	76.85			2779.21	L. 17.
	Ret.	300.19				
	R.	4578.12	5455.46			
21	10280	47.85			4256.16	L. 20.
	279	400.00				
	281	585.75				
	282	219.11				
	268	10.00				
	R.	2500.00				
	R.	4941.83	1007.08			
22	10291	400.92				
	288	15.10				
	287	71.17			1806.09	L. 21.
	285	10.00				
	R.	2948.75		632.77"		

(Testimony of H. O. Johnson.)

(Endorsement on Back:)

“Case No. 25-E. United States District Court, Western District of Washington. City of Centralia vs. U. S. Nat. Bank of Centralia et al. Defendant’s Exhibit “A.” Filed in the U. S. District Court, Western District of Washington, Southern Division. Jul. 7, 1915. Frank L. Crosby, Clerk. By —————, Deputy.”

Defendant then introduced in evidence, as Defendant’s Exhibit “B,” a chart, illustrative of the daily balances of the United States National Bank with the Bank of Commerce, between July 11th and July 22d, 1914, both dates inclusive, which shows that the United States National started on July 11th with an overdraft with the National Bank of Commerce of \$11,071.64. The account varied above the line of overdraft until July 22d, when the United States National had an overdraft with the National Bank of Commerce of \$632.97.

The witness testified that the books of the bank would show the actual credits and actual charges made against. [73] the account of the United States National with his bank; that the relation was just the same as any other depositor; that the bank books would show the withdrawals made and the actual condition of the account.

Redirect Examination.

(By Mr. PILES.)

Q. Now, this apparent overdraft was about \$600, you say, on the 22d day of July, and was wiped out when, according to your books?

(Testimony of H. O. Johnson.)

Mr. OLDHAM.—I object to that as immaterial and irrelevant.

The COURT.—Objection overruled; exception allowed.

A. On July 23d, it shows a credit.

Q. How much? A. \$13,809.94.

Q. Then, if the books of the Centralia defendant bank show that they had a balance in your bank of about that amount of money on the 22d day of July, and would show a balance of about \$13,000 on the 23d of July, that would be evidence of the fact that that amount was in transit from your bank to the Centralia Bank?

A. There would be items in transit from somewhere; it might be from their bank to our bank.

Q. If there were no items in transit at that time, the Centralia balance would not show a balance in your bank?

A. It would show some balance, if there were no items in transit, our books would be the same as the books in Centralia.

Q. You testified a moment ago that if an item was in transit and had not reached you, you would not give credit? A. That is right.

Q. If your bank sent any items for collection, the books would show it? [74]

A. Yes, sir.

Q. You say your books show an overdraft of \$600?

A. On the 22d shows an overdraft of about \$600.

Q. It necessarily follows that the Centralia Bank was sending you on the 22d certain moneys?

(Testimony of H. O. Johnson.)

A. Yes, sir. Their remittances on the 22d wiped out the overdraft.

Q. Is it not a fact that bankers all treat checks, drafts and credits as actual cash?

A. Well, it is treated as cash ordinarily, yes, sir.

Q. Is it not always treated as cash?

A. It is counted as cash.

Q. In other words, when you make your bank statement to the bank examiner or to the comptroller of the currency, if you have sent a draft from Tacoma on a New York Bank, and deposited that draft for \$1,000, that correspondent and yourself in making your statement to the comptroller of the currency would treat that draft as actual cash?

A. Yes, sir.

Q. And all banks do that, don't they?

A. I think they do.

Q. You do not know of any bank that does not?

A. No, sir.

Q. You could get the money if you wanted to, but in place of actual coin you take credit and treat it as cash, and the government lets you treat it as cash?

Mr. OLDHAM.—I think that is immaterial.

Objection overruled.

A. It is legal reserve anyhow.

Q. And the government allows you to count it as actual cash?

A. Well, it is counted as legal reserve. [75]

Q. Well, as a matter of fact, Mr. Johnson, there is no bank that takes any coin to speak of and puts it in reserve banks. The business of the world is

(Testimony of H. O. Johnson.)

carried on with checks and drafts? A. Yes, sir.

Q. And treated by the world as actual cash?

A. Yes, sometimes they transfer money, sometimes.

Q. They do not usually transfer actual coin, but notes, drafts and checks for collection are treated as actual cash? A. Well, it is credited as cash.

Q. Is it not treated as actual cash by all bankers?

Mr. OLDHAM.—I do not know whether this witness knows what the custom is as to all bankers.

The WITNESS.—No, sir, I do not—(interrupted).

Mr. PILES.—Q. If I go to your bank and deposit a check from John Jones in my favor for one thousand dollars on Dexter Horton Company's Bank, in Seattle, you take that check and collect it, and if you credit my account with it you treat it as actual coin, don't you?

A. Well, it is credited to the account if they knew the check was good.

Q. Well, assuming that the check is good?

A. Yes, sir.

Q. You can go to Dexter Hortons and get that thousand dollars, on the check, assuming the check to be good, if you wanted to, but instead of doing that you treat it as actual money in the vaults of your bank? A. Well, it is counted as cash.

Q. Well, is it not cash money?

A. Yes, sir. [76]

(Testimony of H. O. Johnson.)

On recross-examination, witness stated that his bank carried about ten million of deposits; that if all depositors came in at one time it would be impossible to pay them cash; that the books of the National Bank of Commerce showed the actual condition of the account of the United States National with that bank. [77]

Testimony of George B. Mason, for Plaintiff.

GEORGE B. MASON, a witness for the plaintiff, testified that he was city treasurer of Centralia from 1908 to December, 1914. That he recalled warrants Number 82 and Number 89 drawn on local improvement district for \$1330.00, \$6630.13 and \$7960.15, respectively. The city collected the money to pay these warrants in February, 1914; that he had notified C. S. Gilchrist that the money was in the treasury to take up these two warrants early in February, 1914. Two or three days later, witness asked Gilchrist why he did not bring the warrants in and get them paid. Gilchrist was vice-president and general manager of the United States National.

Plaintiff then introduced in evidence exhibit number 10, which, in substance, was a statement showing balances due the United States National Bank from its various correspondents as shown on the books of that bank between the dates of July 13th, 1914 and September 19th, 1914, both inclusive; showing balances due from reserve agents, banks not reserve agents, sundry banks and bankers and totals, which said exhibit is as follows: [78]

**Plaintiff's Exhibit No. 10—Balances Due Bank from
Various Correspondents.**

**BALANCES DUE TO THE UNITED STATES
NATIONAL BANK OF CENTRALIA FROM
ITS VARIOUS CORRESPONDENTS. (As
shown by the books of the U. S. N. B. Centralia.)**

Date. 1914.	Reserve Agents.	Banks Not Reserve Agents.	Sundry Banks and Bankers.	Total.
July 13	88,971.55	43,189.16	18,743.88	150,903.79
14	82,964.31	44,298.50	18,942.56	146,205.37
15	69,056.56	46,069.99	11,974.99	127,101.54
16	97,967.27	31,525.82	8,594.04	138,087.13
17	96,582.78	30,542.54	8,378.67	135,503.99
18	99,745.42	29,610.56	8,279.08	137,635.06
20	94,844.71	27,218.87	11,965.27	134,028.85
21	71,304.73	24,165.36	13,720.05	109,190.14
22	70,520.54	23,986.72	7,212.94	101,720.30
23	88,294.91	24,836.61	12,601.24	125,732.76
24	79,915.93	14,983.19	21,893.59	116,792.71
25	104,245.33	15,953.49	25,138.92	145,337.74
27	94,709.56	15,388.34	37,672.04	147,769.94
28	46,082.48	12,589.86	66,144.63	124,816.97
29	41,199.88	15,809.52	72,428.14	129,437.54
30	33,709.60	10,309.52	72,831.84	116,850.96
31	26,426.74	10,309.52	81,278.34	118,014.60
Aug. 1	52,446.79	15,487.48	42,894.09	110,828.36
3	35,493.33	20,767.62	45,914.49	102,175.44
4	28,387.56	20,279.12	18,235.38	66,902.06
5	22,802.74	23,587.76	19,213.82	65,604.32
6	27,346.48	20,677.94	18,047.93	66,072.35
7	39,914.66	15,578.15	8,610.79	64,103.60
8	50,011.62	15,972.57	11,193.93	77,178.12
10	39,726.39	15,888.17	1,136.79	56,751.35
11	46,907.32	15,356.03	736.48	62,999.83
12	64,157.21	12,856.03	2,132.09	79,145.33
13	104,845.38	12,856.03	630.94	118,332.35
14	99,144.19	12,856.03	1,358.16	113,358.38
15	99,641.98	12,853.78	2,568.07	115,063.83

Date.	Reserve Agents.	Banks Not Reserve Agents.	Sundry Banks and Bankers.	Total.
Aug. 17	109,749.51	12,853.79	267.48	122,870.77
18	87,264.41	12,853.78	65.90	100,184.09
19	70,989.16	12,853.78		83,842.94
20	75,349.47	12,852.98		88,202.45
21	87,840.82	12,852.98		100,693.80
22	73,587.03	12,582.98	1,463.20	87,903.21
24	102,267.33	12,852.98	445.72	115,566.03
25	93,298.06	13,145.46		106,443.52
26	96,694.	13,145.46	618.52	110,457.98
27	90,453.29	8,139.49	3,295.47	101,888.25
28	88,013.81	8,139.49	2,857.61	99,010.91
29	89,096.21	8,139.49	2,798.69	100,034.39
31	72,576.26	11,843.62	5,358.20	89,778.08
Sept. 1	61,487.22	13,423.93	5,248.17	80,159.32
2	79,908.15	27,833.82	5,871.67	113,613.64
3	65,826.90	25,238.80	6,498.29	97,563.99
4	65,030.33	27,051.16	7,221.55	99,303.04
[79]				
5	79,045.54	26,768.60	3,902.04	109,716.18
8	75,804.94	27,652.25	4,846.29	108,303.48
9	68,075.17	27,398.06	910.21	96,383.44
10	63,970.37	36,551.50	983.18	101,505.05
11	64,639.57	33,954.36	735.87	99,329.80
12	69,792.00	32,006.27		101,798.27
14	55,340.97	36,805.09		92,146.06
15	65,429.64	20,223.91		85,653.55
16	40,532.70	22,920.18		63,452.88
17	45,613.94	14,947.39		60,561.33
18	43,174.42	27,293.90		70,468.32
19	46,052.32	14,974.69		61,027.01

(Plaintiff's Exhibit No. 10, filed July, 7, 1915.) [80]

Plaintiff also introduced in evidence exhibit number 11, which is a transcript from the books of the United States National Bank of Centralia, showing the state of the account between that bank and the National Bank of Commerce between the dates of July 11th and September 19th, 1914, both inclusive.

**Testimony of E. G. Shorrock, for Plaintiff
(Recalled).**

E. G. SHORROCK, recalled by plaintiff, identified exhibit number 11.

On cross-examination, the witness stated that his entries under the word "Sundries" on exhibit number 11, were shown on the bank books under the letter "R"; that "R" has a significance and means "Remittance." That the witness had [81] substituted the word "Sundries" for Remittances on exhibit number 11.

Witness stated that he could not tell what these remittances composed but from his examination he could not find that any of them were cash.

Defendant then introduced in evidence exhibit "C," which is a claim of the United States Fidelity & Guaranty Company against the United States National Bank in the sum of \$10,000.00, which had been paid by the bonding company of the City of Centralia on the deposits of the city with the United States National.

Defendant then introduced in evidence exhibit "D," being a receipt of W. G. Boren, city treasurer of Centralia, to G. B. Mason, city treasurer resigned of City of Centralia, showing receipt of \$16,315.92, represented by cash in drawer and checks on solvent banks; claim of \$54,550.19 against United States National Bank and claim against the Union Loan & Trust Company, in the hands of the receiver, of \$78,414.12, less amounts paid by bonding companies of \$30,000.

(Testimony of E. G. Shorrock.)

Defendant then introduced in evidence pass-book of G. B. Mason, treasurer, "special," which is exhibit "E," which is the usual pass-book showing deposits, credits and withdrawals, and a balance of \$2,638.31.

Defendant then introduced in evidence exhibit "F," which is a check drawn by G. B. Mason on the G. B. Mason special account, which is in the ordinary form of the usual bank checks, signed "G. B. Mason, special account, city treasurer."

Defendant then introduced some testimony of F. A. Hill, taken at the preliminary hearing, starting with page [82] 85, line 12, down to and including line 3, page 90, which is as follows:

The witness F. A. HILL, in behalf of the defendants, testified on the preliminary hearing that he was clerk of the receiver of the United States National. The G. B. Mason special account of some twenty-six hundred dollars, together with approximately seven thousand of the treasurer's other account, was assigned by the city treasurer to the bonding company who paid the City of Centralia \$10,000.00. This wiped out the special account of G. B. Mason of some twenty-six hundred dollars and reduced the other account some seven thousand. For this amount the bonding company has filed a claim with the receiver.

The witness stated that when the bank failed, there was \$27,899.81 in cash turned over to the receiver; that there was only \$4,596.61 available from banks not reserve agents at that time. While the books of

(Testimony of E. G. Shorrock.)

the bank showed a larger amount deposited with the reserve agents when the bank failed, there were many off-sets claimed by the various banks holding these deposits. For example, the First National of San Francisco, the United States National's books showed a credit balance there of some \$22,000.00, but when the receiver applied for it, there was an off-set claimed in excess of \$50,000.00. The condition of the account with the First National of Portland was similar.

Defendant then introduced in evidence the testimony of C. S. Gilchrist, taken at the preliminary hearing, starting on page 64, line 21 and ending on page 66, line 8. The witness testified that none of the moneys derived from the bonds sold to Carstens and Earles, or the proceeds of the bonds, ever came into the United States National Bank; that [83] these proceeds were disposed of in the usual custom of disposing of credits of that kind in payment of the obligations of the bank as they were presented in the regular course of business. Mr. Mason knew how the transaction was handled and had instructed the witness to place the proceeds of the collection to his credit.

**Testimony of H. O. Johnson, for Defendant
(Recalled).**

H. O. JOHNSON was recalled as a witness for the defendant and testified that a package of papers introduced as Defendant's Exhibit "G" showed the charges that were made against the account that the Centralia bank had with the National Bank of Com-

(Testimony of H. O. Johnson.)

merce, covering the dates between July 13th and July 22d, 1914, both inclusive. The first debit slip was an item of \$3,610.00 against the Centralia bank and is stamped "Paid, National Bank of Commerce of Seattle, July 13th, 1914," showing that its payment was made on the same day that the item was made out. Witness explained that it was a debit ticket for a note that had been sent to the Centralia bank, and the National bank simply marks the ticket "Paid" and forwards the note to the Centralia bank; that the stamp mark "Paid" has no bearing upon the question whether the note has actually been paid. * * *

"Q. The stamp marked 'Paid' has no bearing upon whether or not the note itself is actually paid.

A. No, sir, it would not show at all."

"On cross-examination the witness testified that Centralia is a station between Seattle and Portland; that it would only take a few hours to transmit mail from Seattle to Centralia; that they have mail only once or twice a day, and that an item transmitted between the points would arrive the next day."

On cross-examination, the witness stated that the item had not reached the Centralia bank until the next day; that it was sent marked "Paid" by the National Bank of Commerce on the day that it was sent out. [84]

**Testimony of Frank A. Hill, for Defendant
(Recalled).**

FRANK A. HILL, was recalled as a witness on behalf of the defendant. He testified as to Defendant's Exhibit "A," which is a transcript of account

(Testimony of Frank A. Hill.)

of the United States National Bank with the National Bank of Commerce, that on July 11th, there was an overdraft with the National Bank of Commerce against the United States National of \$11,071.64. The next transaction between the banks occurred on July 13th when deposits or credits aggregating \$54,000 were deposited in that account, which included \$50,911.88, which is the matter in dispute in this action. Referring to Defendant's Exhibit "G," which represented the withdrawals from that account between July 13th and July 22d, both inclusive. Witness testified that the first withdrawal of \$3,610.00, with which the account of the United States National was charged was a Wallville note which was accepted by the Eastern Railway & Lumber Company, which had been sent by that company to the United States National Bank of Centralia. The note had been discounted by the United States National Bank with the National Bank of Commerce. This note, together with two similar notes of \$4,870.00 and \$3,745.00, respectively, was charged by the National Bank of Commerce to the United States National, and credited by the latter bank to the former on July 15th, 1914, making a total sum of \$12,225.00. These notes were a part of an issue of \$20,400, being all notes drawn by the Wallville Lumber Company and accepted by the Eastern Railway & Lumber Company, and when due, were replaced by a new series. The original notes were returned to the United States National Bank of Centralia by the National Bank of Commerce and were credited to

(Testimony of Frank A. Hill.)

the account of the National Bank of Commerce, a [85] debit occurring on one side and a credit on the other side. The bank did not receive money on these notes from either the makers or acceptors, but a new issue of \$20,400 took the place of the old ones. The new issue was made up of different denominations and just what exactly became of these particular items is not traceable. However, of the total re-issue of \$20,400.00, part were sent to the Continental & Commercial Bank of Chicago and part were returned to the National Bank of Commerce at Seattle. Two of these new issue notes, one for \$3,685.00 and another for \$3,240.00, were sent to the National Bank of Commerce on July 23d; two for \$3,750.00 and \$4,760.00 were sent to the Continental & Commercial in Chicago. Still another one for \$4,965.00 was sent to the First National of Portland. The two that were sent to the National Bank of Commerce were credited by that bank to the United States National on July 23d.

The next overdraft of the United States National with the National Bank of Commerce occurred on July 29th when this overdraft was \$87.98. The two renewal notes which went to the Continental & Commercial, were sent out on July 23d, 1914, on which date they were charged to the Continental on the books of the United States National. About eight days after that the Continental & Commercial bank gave the United States National credit for them. The other note was sent to the First National of Portland on July 23d. The United States National

(Testimony of Frank A. Hill.)

was overdrawn with the First National of Portland on July 29th, 1914.

The second item of \$150.00 on exhibit "A" was an overdraft drawn by the United States National on the National Bank of Commerce, in favor of one Glaser. There is [86] nothing in the books of the bank to show how this was secured, whether by money or by check on the deposit account.

The next item was a draft for \$17.64 drawn in favor of one Terrey. The record showed it was secured by one Alvord who was a depositor in the United States National Bank.

The next item is a draft for \$25.50, payable to the order of the Seattle National. There is nothing in the records of the bank to show how the bank was secured.

The next item was a draft for \$223.82, payable to the order of the First National Bank of Seattle and was in exchange for checks which the First National Bank had honored, drawn on the United States National and other banks in Centralia.

The next item of \$2,561.58 represents checks honored by the National Bank of Commerce drawn on the United States National and other banks in Centralia. This item of \$2,561.58 is covered by remittance sheet which is the seventh paper in Defendant's Exhibit G, which shows that a large part of the payment was to depositors in the United States National for checks which they had cashed in Seattle or had been cashed through the Seattle bank; that all of the checks which had the letter "U" standing opposite the amount were checks drawn on the United States National Bank of Centralia.

(Testimony of Frank A. Hill.)

The next item was \$9.40, being a draft drawn in favor of a Seattle bank for checks it had cashed and was simply a repayment to that bank for checks the Seattle bank had paid on the United States National.

The next item was a draft of \$6.50 in favor of one Browning and secured by one Keefe, who was a depositor in the United States National; whether secured by money, check or [87] draft was unknown.

The next item of \$2,865.61 was a draft drawn in favor of the First National Bank of Seattle and was in exchange for checks which that bank had honored on the United States National and other banks in Centralia.

Passing the next two items which were transfers to the Continental & Commercial Bank of Chicago of \$10,000.00 and \$10,000.75 respectively, the witness testified that the following item of \$1,477.98 covered checks honored by the National Bank of Commerce which were drawn on the United States National and other banks in Centralia, the remittance sheet being contained in Defendant's Exhibit "G." That was on July 14th. A large majority of these checks were checks of the United States National's own depositors.

The next two items of \$4,870.00 and \$3,745.00 were identical charges as the first item under July 13th which was a Wallville paper.

The next item of \$5.00 covered a charge made by the National Bank of Commerce on account of a check which had been sent it by the United States National for which there were not sufficient funds.

The next item was \$26.76, payable to the order of

(Testimony of Frank A. Hill.)

the Seattle National Bank and secured by the freight agent (at Centralia). There is nothing to show on the records of the bank how this item was secured.

The next item of \$24.76 was in favor of one Terry, city treasurer, secured by one Young and it is impossible to tell how the item was obtained.

The next item was \$7.50, payable to the order of the Aetna Investment & Trust Company on which there was no [88] information.

The next item was \$7,500.00 and has already been covered by his testimony, being a transfer of credit to the Bank of California, and the next item of \$1,000.75 was a transfer to the Continental & Commercial of Chicago.

The next item of \$3,561.60, under date of July 15th, represented the amount of checks drawn on the United States National which were honored by the National Bank of Commerce. All of the checks in this particular remittance were on the United States National and the remittance sheet is contained in Defendant's Exhibit "G" under date of July 15th.

The next item of \$3.65 was a draft drawn in favor of Wooley & Company and there is no information concerning it.

The next item of \$24.40 was payable to the order of the Seattle National Bank, and there is no information concerning it.

The next item of \$49.15 is payable to Schwabacher Brothers and there is no information concerning it.

The next item of \$100.10 is payable to the order of the National Bank of Commerce and there is no information concerning it.

(Testimony of Frank A. Hill.)

The following item of \$314.63 is a draft drawn in favor of the First National Bank of Seattle and was in exchange for checks which that bank had honored which were drawn on the United States National and other banks in Centralia.

The next item of \$573.11, payable to the order of the First National Bank of Seattle, was in exchange for checks which that bank had honored which were drawn on the United States National and other banks in Centralia. [89]

The next item of \$593.11 was for checks honored by the National Bank of Commerce drawn on the United States National and two other banks in Centralia. The remittance sheet covering it is included in Plaintiff's Exhibit "G" under date of July 16th.

The next item was a draft for \$82.00, payable to the order of one Mulligan. There is nothing in the records of the bank to show how this draft was secured.

The next item was \$70.85, with no method of determining what the item covered.

The next item of \$187.73 was in favor of the First National of Seattle, given in exchange for checks which had been honored in that bank drawn on the United States National and other banks in the City of Centralia.

The next item of \$2,457.72 represents checks honored by the National Bank of Commerce, drawn on the United States National and one other bank in Centralia. The remittance sheet is included in Defendant's Exhibit "G" under date of July 17.

(Testimony of Frank A. Hill.)

The next item of \$19.74 was a draft payable to the order of the New York Life, and there is no way of determining how it was secured.

The next item of \$34.00 was a draft payable to the Seattle National and there is no way to tell how it was secured.

The next item was for \$300.00, a draft payable to the order of the Bank of Vancouver, and was in exchange for a certificate of deposit, Number 11,971, which was issued to the United States National.

The next item was a draft for \$10.00 payable to one Ketchum, with nothing to show how it was secured. [90]

The next item was a draft for \$840.00, drawn in favor of one Brown, in exchange for certificate of deposit Number 12,021 issued by the United States National.

The next item was a draft for \$37.50, drawn in favor of the First National Bank of Seattle in exchange for checks honored by that bank drawn on the United States National and other banks in Centralia.

The next item was a draft for \$1.69, drawn in favor of the First National of Seattle for some small collection.

The following item of \$2,291.86 represented the amount of checks honored by the National Bank of Commerce, drawn on the United States National and two other banks in Centralia, the remittance sheet being included in Defendant's Exhibit "G" under date of July 18th.

(Testimony of Frank A. Hill.)

The next item of \$76.85 was a draft payable to the order of the Seattle National Bank and there is nothing to show how it was secured.

The following item of \$300.19 represents the amount of a check which had been previously sent to the National Bank of Commerce, drawn on the Metropolitan Bank and returned to the United States National on account of an endorsement. The United States National, in turn, charged that amount to one Reese and credited the account of the National Bank of Commerce.

The next item of \$4,578.12 represents the amount of checks honored by the National Bank of Commerce, drawn on the United States National and other banks in Centralia, the remittance sheet being included in Defendant's Exhibit "G" under date of July 20th. [91]

The next item of \$47.85 was a draft payable to the order of the Seattle National Bank and there is nothing to show what was exchanged for the draft.

The next item of \$400.00 was a draft drawn in favor of Edgar Battel, postmaster, secured by one Benedict, postmaster of Centralia.

The next item of \$585.75 was a draft drawn in favor of the First National of Seattle and was given in exchange for checks honored by that bank drawn on the United States National and other banks in Centralia.

The next item of \$219.11, payable to the National Bank of Commerce, with the same testimony applicable.

(Testimony of Frank A. Hill.)

The next item of \$10.00 was a draft payable to the order of a typewriter company with nothing to show how it was obtained.

The next is an item of \$2,500.00. This was the note of the Chester Snow Log & Shingle Company which the National Bank of Commerce had charged to our account and returned the note to us. This note was a discount with the National Bank of Commerce, and falling due, was returned by that bank to the United States National. Upon its return it was carried by the United States National until July 28th, when there appears a charge to the account of Chester Snow who had a deposit in the United States National, and on that date the note disappears. The records show that the note was thus charged to the account of the maker, the Chester Snow Log & Shingle Company. The Chester Snow Log & Shingle Company were overdrawn and were indebted to the United States National at the time of insolvency to the extent of \$80,000.00. That company is in the hands of a receiver and [92] it is very doubtful whether they will pay even preferred claims. The bank has never collected anything from that company which was charged to the Chester Snow account and no one else has paid the bank anything for it.

The next item of \$4,941.83 represents the amount of checks honored by the National Bank of Commerce, drawn on the United States National and one other bank in Centralia, the remittance sheet being included in Defendant's Exhibit "G" under date of July 21st.

(Testimony of Frank A. Hill.)

The next item of \$400.92 was a draft drawn in favor of the First National of Seattle and was given in exchange for checks honored by that bank drawn on the United States National and other banks in Centralia.

The next item of \$15.10 was a draft drawn in favor of one Patterson, and there is nothing to indicate what was given in exchange for it.

The next item of \$71.17 was a draft drawn in favor of Fisher Brothers, and there is nothing to show what was given in exchange for it.

The next item of \$10.00 was a draft drawn in favor of one Duryee, and there is nothing to show what was given in exchange for it.

The last item of \$2,948.75 represents the amount of checks honored by the National Bank of Commerce drawn on the United States National and two other banks in Centralia, the remittance sheet being included in Defendant's Exhibit "G" under date of July 22d.

After the last charge of \$2,948.75 on July 22d, the United States National's account with the National Bank of Commerce was overdrawn \$632.77. *The wit-* [93]

The witness then testified that the amount of cash deposited over the counter of the United States National Bank from July 28th, 1914, until the bank was closed September 19th, 1914, was \$129,372.92. This included nothing except actual cash. The total claims of creditors of the bank was \$1,203,140.35. A one hundred per cent assessment had been levied

(Testimony of Frank A. Hill.)

against all its stockholders. There are not sufficient assets of the bank to pay in full. The bank had been insolvent since September 21st, 1914, and there had been paid one dividend of ten per cent.

On the day the bank failed, there was actual cash on hand which passed into the hands of the receiver of \$27,899.81. Cash items on that date amounted to \$5,206.84. The witness did not count the counterfeit coins as cash. Of the cash items of over five thousand dollars, the major part of them are still carried uncollected. They include checks that are cashed after the making up of the cash-book by the teller; clearances for the day and current expenses of the bank during that day. They are not always converted into cash.

Taking up the condition of the account between the United States National and the Bank of California in Tacoma, witness stated that on July 29th, 1914, the United States National was overdrawn with the Bank of California in the amount of \$1,213.68; that after the deposit of the Wallville paper, to which witness had previously referred, with the First National of Portland, the next overdraft of the United States National with the First National of Portland occurred on August 5th, 1914.

As to the Bank of Italy, witness testified that [94] at the time the receiver took charge of the affairs of the United States National, the United States National was indebted to the Bank of Italy in the sum of over fifty-nine hundred dollars, for which amount the Bank of Italy had filed its claim and it had been allowed.

(Testimony of Frank A. Hill.)

On cross-examination, the witness stated that the Wallville notes, aggregating \$12,225.00 had been discounted by the National Bank of Commerce on the guarantee of the United States National; that they were then sent back to the United States National; when they fell due that bank gave the Seattle bank credit for their amount. That there was subsequently a renewal of this paper and \$6,925.00 of the renewal notes were taken by the National Bank of Commerce again on the credit of the United States National. Witness did not know where those notes were and said he thought they had been paid to the Seattle Bank. The items were sent to the United States National, to its reserve and other banks for collection and credit.

“Q. How was the business conducted between the defendant bank and its reserve banks and the other banks it was doing business with, that is to say, did they or did they not send items out for collection and credit, or for collection and return?

A. Items were sent for collection and credit.

Q. So the Centralia bank then had a general account running with all of these other banks, and if it sent out a note for collection, for instance, or a draft or check or any other item, that bank, whether it was a reserve or nonreserve bank, would credit the account of the Centralia Bank and the Centralia Bank would charge it to the bank to whom it sent this item? A. That was the usual course, yes, sir.”

That between July 21st and 22d, both dates inclusive, the defendant bank transferred from the Na-

(Testimony of Frank A. Hill.)

tional Bank of Commerce and other reserve banks, possibly \$47,500.00. On July 13th, they transferred to the Bank of California in Tacoma \$10,000.00; July 14th, Chicago, a telegraphic transfer [95] of \$10,000; the Bank of California, Tacoma, July 15th, \$7,500.00; July 15th, Chicago, telegraphic transfer, \$10,000.00; the Bank of California, Tacoma, July 16th, \$10,000.00. There was transferred from the National Bank of Commerce of Seattle to the Bank of California on July 23d, according to the books of the Seattle bank, \$2,500.00 and \$5,000.00, making a total of \$7,500.00. According to the books of the Centralia bank, the transfer took place on the 22d or 21st.

Of the cash items of \$5,205.00 and some cents with the bank when it failed, witness stated there was about four thousand left uncollected. He stated that as to the Bank of Italy account when the United States National failed, the Italy bank held some rediscounts of the United States National upon which the United States National was liable. These rediscounts being worthless, the other bank filed their claim and it was allowed. What little balance the United States National had there was applied on the rediscounts before the claim was allowed. The credit balance of \$5,662.71 which the United States National had with the Bank of Italy on September 19th was applied on the Wabash Lumber & Shingle Company notes. The Bank of Italy filed a claim within a week after that time.

(Testimony of Frank A. Hill.)

On redirect examination, the witness stated that the relation between the United States National and the Bank of Italy was that the books showed a deposit with the Bank of Italy which had been wiped out by the claim of the Bank of Italy against the United States National and the balance was applied on notes which the United States National owed [96] the Bank of Italy.

On recross-examination, the witness stated that the claim of the bank was a general one and did not claim priority. In answer to a question by the Court as to the \$20,400.00 notes of the Wallville paper, some six hundred dollars went back to the Seattle bank and "You understood those notes were paid?

A. Those notes have been taken up after the bank failed.

Q. That is the United States National Bank did not pay them?

A. No, sir; they were taken up by the Eastern Railway & Lumber Company.

Q. The endorser?

A. The endorsers or acceptors, they were acceptors.

Q. And is the same true of the rest of the \$20,400?

A. Yes, sir.

Q. And at the time the Chester Snow Log & Shingle Company paper was charged to their account, was the money in their account to the amount of the notes they were charged with?

A. They had a credit in excess of that amount; yes, sir."

(Testimony of Frank A. Hill.)

On redirect examination, the witness then took up the state of account between the United States National and the National Bank of Commerce from July 22d to July 28th, in detail.

“Q. Leaving off, Mr. Hill, where the overdraft of the Centralia Bank occurred with the Seattle Bank on July 22d, according to the books of the Seattle Bank, I will ask you to further trace the transfer of the credit existing at the Seattle Bank from that date up to and including the 28th of July when the overdraft occurred on the books of the Centralia Bank.”

The next item charged to the account of the United States [97] Bank by the National Bank of Commerce was \$15.00, being a draft drawn in favor of one Stary. It is impossible to say what was given in exchange for it. That was on July 23d.

The next item was a transfer of \$2,500.00 to the Bank of California. The next item was for \$79.25, payable to the order of the Seattle National Bank and he did not know what was given in exchange for it. The next item for \$59.20 was a draft drawn in favor of the Seattle National and he could not say what was given in exchange for it. The next is an item for \$5,000 and is a draft drawn in favor of the Bank of California of Tacoma. The next item of \$99.34 is a draft drawn in favor of the First National Bank of Seattle in exchange for checks which they had honored drawn on the United States National and other banks in Centralia. The next item was for \$559.27 and represented the amount of checks

(Testimony of Frank A. Hill.)

honored by the National Bank of Commerce drawn on the United States National and other banks in Centralia, the remittance sheet being included under date of July 23d. The next item of \$18.50 covered a previous item sent to the National Bank of Commerce and returned because of nonpayment. It was charged to the account of Ely & Ely on the books of the United States National and credit given the National Bank of Commerce, Ely & Ely being depositors in the United States National. The next item was for \$85.00 drawn in favor of one Pease and witness could not say what was given in exchange for it. The next item of \$56.50 was a draft drawn in favor of the First National Bank of Seattle in exchange for checks honored. The next item of \$1,500.00 was a collection sent by the First National Bank of Seattle for which the United States National received no money. The [98] next item of \$33.30 was a draft drawn in favor of the National Bank of Commerce, for what was given he could not say. The same applies to the next item of \$175.00. The next item of \$15,000.00 was payable to the order of the Bank of California. The next item was for \$24.90, a draft drawn in favor of the Exchange National Bank of Spokane. The next item is for \$84.22, being a small collection sent to the United States National and it is impossible to determine whether they got any money on it or not. The next item of \$333.30 was a collection drawn on one Boerman which was sent to the United States National by the National Bank of Commerce and was cleared

(Testimony of Frank A. Hill.)

through the Farmers and Merchants Bank of Centralia. The next item was for \$4.85, a small check which had been previously sent to the National Bank of Commerce by the United States National, and was returned because of a locking endorsement. The next item of \$3,132.34 represented the amount of checks honored by the National Bank of Commerce drawn on the United States National and other banks in Centralia, the remittance sheet being included under date of July 24th. The next item of \$8.85 was a check which had previously been sent to the National Bank of Commerce and returned because of insufficient funds. This check was in turn charged by the United States National to the account of the City Sand & Gravel Company which was a depositor in the bank and like credit given the Seattle bank. The next item was for \$213.19, payable to the order of the First National Bank of Seattle in exchange for checks which they had honored. The next item for \$5,000.00 was a draft drawn in favor of the Bank of California, Tacoma. The next item of \$66.15 was drawn in favor of the Seattle National [99] bank and witness could not say what was given in exchange for it.

The next item of \$25.00 was a draft drawn in favor of one Grant and witness could not say what was given in exchange for it. The next item of \$6,272.35 represented the amount of checks honored by the National Bank of Commerce drawn on the United States National and other banks in Cen-

(Testimony of Frank A. Hill.)

tralia, the remittance sheet being included under date of July 25th. The next item was a draft for \$1.00, payable to the Logged Off Farm. The next item is of the same character. Both were procured by J. W. Daubney who was a depositor in the bank. The next item of \$25.00 was a draft drawn and it is impossible to tell what was given in exchange for it. The next item of \$81.50 was a draft payable to the National Bank of Tacoma and it cannot be ascertained what was given in exchange for it. The next is a draft for \$5,000.00 drawn in favor of the Bank of California, Tacoma. The next item of \$242.63 was a draft drawn in favor of the First National Bank of Seattle, given in exchange for checks honored by that bank drawn on the United States National and other banks of the city of Centralia. The next item for \$1,971.92 was a draft in favor of the Fidelity Bank of Tacoma, given in exchange for checks which that bank had honored drawn on the United States National and other banks in Centralia. The next item for \$47.10 was a draft drawn in favor of the Seattle National and it is impossible to tell what was given in exchange for it.

The next item was for \$3,069.00, being two notes of the Wallville Lumber Company accepted by the Eastern Railway & Lumber Company of similar character to the first item to which witness had testified. The United States [100] National had never received payment of those two notes. The next item of \$10,067.70 represented checks honored by the National Bank of Commerce drawn on the

(Testimony of Frank A. Hill.)

United States National and other banks of Centralia, the remittance sheet being included under date of July 27th. The next item of \$50.00 was drawn in favor of the United States National Bank of Seattle and witness could not say what was given in exchange for it. The next item of \$200.15 was a draft drawn in favor of one Meyer, assistant treasurer and it is impossible to say what was given in exchange for it. The next item of \$80.70 was a draft in favor of the Seattle National Bank and it is impossible to tell what was given in exchange for it. The next item of \$163.00 was a draft drawn in favor of the Meyer Piano Company and it is impossible to tell what was given in exchange for it. The same applies as to the following item of \$25.00, and also the same as to the next item of \$1,400.00.

The next item of \$43.45 was payable to the order of the First National of Seattle. It was given in exchange for checks which they had honored, and the same is true of the next item of \$2,000.00 in favor of the First National of Seattle. The next item of \$2,827.35 represents checks honored by the National Bank of Commerce drawn on the United States National and other banks in Centralia, the remittance sheet being included under date of July 28th. The next item was a draft for \$50.00. The witness could not state what it was given for. The next item was for \$2,500.00, being a transfer to the Bank of California. The next item of \$52.50 was a draft and what was given in exchange for it, the witness could not state. [101]

(Testimony of Frank A. Hill.)

The next item of \$134.60 was a draft payable to the order of the First National of Seattle, given in exchange for checks honored. The next item was a draft for \$8,000, being the balance due the Chehalis National Bank on the clearing of warrants. The next item of \$229.39 was payable to the First National Bank of Seattle, and was given in exchange for checks honored. The next item of \$1,466.41 represented the amount of checks honored by the National Bank of Commerce, drawn on the United States National Bank of Centralia and other banks in Centralia, the remittance sheet being included under date of July 20th.

The written evidence of these charges was then introduced in evidence and included in Defendant's Exhibit "H."

During this period of time the only remittances which were made to any other correspondent bank was that to the Bank of California. The first of these was on July 20th, of \$2,500.00, on which date a draft was drawn on the Seattle account and transferred to the Bank of California. After this transfer the state of account between the United States National and the Bank of California was that the United States National was overdrawn to the Bank of California at the close of business on July 20th, \$8,241.54.

The next transfer as shown by exhibit "G" from the Seattle account to the Bank of California was \$5,000.00 on July 21st. At the close of business on the 21st, the Centralia bank was still overdrawn

(Testimony of Frank A. Hill.)

with the Bank of California, \$2,524.62.

The next transfer to the Bank of California from the Seattle account was \$15,000.00 on July 22d. After this [102] transfer which was actually made on July 23d, there was a balance with the Bank of California in favor of the United States National of \$453.38. The next transfer was \$5,000.00 to the Bank of California on July 24th. After giving credit for that in the Bank of California, the United States National was overdrawn with the Bank of California \$3,004.54.

On the 25th of July, an additional transfer of \$5,000.00 was made from the Seattle account to the Bank of California. After this transfer was made, there was a balance of \$2,251.08 due the United States National from the Bank of California.

The last transfer from the Seattle bank to the Bank of California was a draft of July 27th for \$2,500.00, and after the deposit of that in the Bank of California, the United States National had a balance there of \$1,355.05. This was at the close of business on July 28th. On July 29th, the United States National was overdrawn with the Bank of California, \$1,213.68.

On cross-examination, witness said that whether the United States National had not transferred from the National Bank of Commerce to other reserve banks between July 13th and July 28th, 1914, \$82,500.00, he had not compiled the figures and could not say; that they had \$55,000.00 up to the 22d.

“Q. You transferred \$62,500 to the Bank of

California, and \$20,000 to Chicago between those dates; that would make \$82,500?

A. If we did transfer that much,—we had \$55,000 I remember when I testified before.”

Whereupon the fact was admitted by opposing counsel. [103]

It was thereupon agreed that the Court might take judicial notice of the laws of Washington relative to the deposit of funds by the city treasurer, and respecting the local improvement warrants, and all questions involved in this case.

Defendants then introduced in evidence the records in certain causes pending in the United States District Court for the Western District of Washington, Southern Division, both determined and undetermined; in which preferred claims were asserted against the defendant bank and its receiver. The facts shown by the records in these various suits are briefly as follows:

1. Anna E. McCormick vs. United States National Bank and A. R. Titlow, receiver, in equity, No. 24, in which a preferred claim in the sum of \$15,245.63 was sought to be established as representing the proceeds of certain warrants which the plaintiff in that suit deposited with the defendant bank for collection and remittance, and which the complaint alleges were collected by the defendant bank in February and April, 1914, but that the bank had failed to remit any part of such proceeds to the plaintiff. The answer in that case denied that the United States National Bank received any actual

cash out of the transaction in question, but alleged that it obtained only a credit in other banking institutions, which credits were exhausted prior to the insolvency of the defendant bank. The answer further set up the pendency of various suits against the bank for preferred claims, and asked that if the defendants were found by the Court to hold in trust for complainant the sum mentioned in the complaint, or any part of it, that the Court should not enter judgment against the defendants except for such proportion of the lowest amount of each on hands between the date of the transaction mentioned in the complaint and the insolvency of [104] the bank, as complainant might be entitled to ratably with other claims which might be established as preferred. This cause was tried June 22, 1915, and was being held under advisement by the Court at the time of the trial of the principal case.

2. A cause entitled John E. Sundquist vs. Clinton A. Snowden, receiver, to recover the sum of \$1296 deposited by plaintiff with the United States National Bank on August 30, 1914, as a special deposit for the purpose of paying off a mortgage. This cause was tried in February, 1915, and a decree entered for plaintiff for the full amount claimed.

3. A cause entitled Frank P. McKinney as receiver of Olympia Bank & Trust Co., vs. A. R. Titlow as receiver of the U. S. National Bank of Centralia, in equity, No. 32, asserting a preferred claim for \$36,550.00, alleged to have been transferred from the Olympia Bank & Trust Co. to the United States National Bank in August and September, 1914, to be

held by the U. S. Bank as a special deposit to be returned to the Olympia bank after a certain examination of the U. S. bank's affairs had been made by the bank examiner. The answer denied the preferred character of the claim and stated that if any transfer of funds from the Olympia bank to the U. S. National were made, it was for the purpose of paying for commercial paper. An intervening complaint by certain stockholders of the Olympia Bank & Trust Co. was also filed in that case, asserting a preferred claim against the U. S. National to the extent of about \$86,000, on the ground that that represented funds obtained by the U. S. National Bank from the Olympia Bank during August and September, 1914, when it was alleged the U. S. National Bank was insolvent and known to be insolvent by its officers and directors, and further that the [105] funds so obtained from the Olympia bank were obtained through the fraud of the U. S. National bank. The answer denied the allegations as to insolvency and fraud and denied that the plaintiff was entitled to the allowance of any greater claim than the sum of about \$16,000 and alleged that plaintiff was entitled only to a general claim for that amount. This cause was at issue at the time of the trial of the City of Centralia vs. U. S. National Bank.

4. A cause entitled Continental & Commercial National Bank of Chicago vs. U. S. National Bank and A. R. Titlow as receiver, in equity No. 38, in which the plaintiff asserted a preferred claim for \$5166.67 as the proceeds of a note forwarded to the U. S. bank on August 25, 1914, and collected by it

shortly thereafter, the proceeds of which the defendant bank failed to remit. The answer in that case denied that the note was forwarded for collection and remittance, and asserted that it was for collection and credit and that credit was given. This cause was at issue at the time of the trial of the principal case.

5. A cause entitled Nicholas Petrinovich v. A. R. Titlow as receiver, in equity No. 37, in which a preferred claim for \$150.00 was asserted for the proceeds of a check alleged to have been deposited on September 15, 1914, by the plaintiff with the U. S. National Bank for collection only, upon which collection was made, but the bank had failed to pay the proceeds to plaintiff. The answer denied the preferred character of the claim and alleged that a certificate of deposit had been issued to plaintiff in payment of the check. The reply denied the affirmative matter in the answer. This cause was at issue at the time of the trial of the principal case.

OLDHAM & GOODALE,
Defendant's Attorneys. [106]

Order Approving Statement of Evidence.

The defendants and appellants having lodged in the clerk's office on February 11, 1916, their proposed statement of evidence on appeal herein, and having notified the plaintiff and its solicitors of such lodgment, and having named the 2d day of March as the time for the presentation of such statement of evidence to the Court for approval; and the plaintiff and respondent having on March 1, 1916, filed cer-

tain objections and proposed amendments to the statement of testimony theretofore filed by the defendants; and the undersigned, being the Judge before whom the cause was tried, being absent from the district on said 2d day of March, 1916, and the parties having stipulated that the time for the presentation of said proposed statement, together with the objections and proposed amendments thereto, might be extended until such time after the return of the undersigned to the district as might be satisfactory to the parties and to the Court, which extension or extensions of time were and are hereby allowed; and the parties having this day appeared in open court by their respective solicitors, and the foregoing statement of evidence having been made true, complete and properly prepared [107] under the direction of the Court, it is

ORDERED that the said statement of evidence be and it is hereby approved.

DONE IN OPEN COURT this 15th day of May, 1916.

EDWARD E. CUSHMAN,
Judge.

Approved:

S. H. PILES et al.,
Solicitors for Plaintiff,
OLDHAM & GOODALE,
Solicitors for Defendants.

(Filed May 15, 1916.) [108]

Petition for Appeal.

Come now the defendants A. R. Titlow, as receiver

of the United States National Bank of Centralia and *the United States National Bank of Centralia* and feeling themselves aggrieved by the final decree entered in the above-entitled court and cause on the 23d day of August, 1915, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California.

R. P. OLDHAM,

R. C. GOODALE,

Solicitors for Defendants.

(Filed Feb. 11, 1916.) [109]

Assignments of Error.

Now, on this 11th day of February, 1916, come the defendants, United States National Bank of Centralia, Washington, and A. R. Titlow, as receiver of the United States National Bank of Centralia, by their solicitors, R. P. Oldham and R. C. Goodale, and say that the decree entered in the above-entitled cause on the 23d day of August, 1915, is erroneous and unjust to them:

1. Because the District Court erred in finding and adjudging that the deposit of funds of the city with the defendant, United States National Bank of Centralia, without obtaining the bond required by

the statutes of the State of Washington to secure their repayment, was sufficient to establish a trust relation or any other relation than that of debtor and creditor between the United States National Bank and the City of Centralia, or to give rise to a preferred claim against the bank upon its insolvency and failure to repay such funds.

2. Because the District Court erred in finding and adjudging that the sum of \$50,911.88, representing the proceeds of the sale of water bonds of the plaintiff city, or any part of such sum, was ever actually traced into the possession of the defendant bank or its receiver, or resulted in augmenting the assets of the bank coming into the hands of the receiver, or was used for any other purpose than the payment of the debts of the defendant, United States National Bank of Centralia.

3. Because the District Court erred in rendering a decree allowing a preferred claim to the plaintiff in the sum of \$44,553.09, which decree is contrary to the testimony and against the law, because the equities of the case entitled the defendants to a decree of dismissal. [110]

4. Because, even if the circumstances under which the plaintiff city's funds were deposited originally were such as to entitle it to a preferred claim, the District Court erred in finding and adjudging that that claim should be paid in full, and in directing the defendants to pay it without first ascertaining what proportion, if any, of the funds of the defendant bank on hand at the time of its failure was properly applicable to the payment of this claim,

in preference to other preferred claims which the evidence shows were and are being urged against the defendant bank and its receiver.

5. Because, even if the proof showed that the circumstances under which the plaintiff's funds were originally deposited with the defendant bank were such as to create a preferred claim, and the funds were sufficiently traced so that that right to a preferred claim still subsisted at the time of the failure of the bank, the District Court nevertheless erred in finding and adjudging that the plaintiff was entitled to a preferred claim in any greater sum than the lowest amount of actual cash in the vaults of the defendant bank at any time between the date of the City's deposit and the day of the bank's failure.

WHEREFORE the defendants pray that the decree be reversed and the District Court be directed to dismiss the bill, and for such other relief as the defendants are entitled to in equity.

R. P. OLDHAM,

R. C. GOODALE,

Solicitors for Defendants.

(Filed Feb. 11, 1916.) [111]

Order Allowing Appeal.

The above-named defendants heretofore filed their assignment of errors and petition for appeal from the final decree herein and it appearing that the defendants have been directed by the Comptroller of the Currency of the United States of America to take such appeal; now, therefore, it is hereby

ORDERED that the petition for appeal be granted and the appeal is hereby allowed. It is

FURTHER ORDERED that the defendant shall not be required to furnish any security upon said appeal.

Dated this 11th day of February, 1916.

EDWARD E. CUSHMAN,

Judge.

(Filed Feb. 11, 1916.) [112]

The United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF CENTRALIA, a Municipal Corporation,

Plaintiff and Respondent,

vs.

THE UNITED STATES NATIONAL BANK OF CENTRALIA, a Banking Association, and A. R. TITLOW, as Receiver of Said Bank, Defendants and Appellants.

Citation on Appeal (Copy).

United States of America,—ss.

To the City of Centralia, a Municipal Corporation,
Greeting:

You are hereby notified that in a certain cause in equity in the United States District Court for the Western District of Washington, Southern Division, wherein the City of Centralia, a municipal corporation, is plaintiff, and The United States National Bank of Centralia, a banking association, and A. R. Titlow, as receiver of said bank, are defendants,

being cause No. 25-E., an appeal has been allowed to the defendants to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree entered in said cause on the 23d day of August, 1915, and you are therefore hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, within thirty days from the date of this citation, to show cause, if any there be, why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said United States District Court this 11th day of February, 1916.

[Seal]

EDWARD E. CUSHMAN,

Judge.

Due service of the foregoing citation is hereby admitted by the plaintiff by its solicitors of record this 17th day of February, 1916.

PILES, HOWE & CAREY and
W. N. BEALS,

Solicitors for Plaintiff,

City of Centralia, a Municipal Corporation.

By S. H. P.

(Filed Feb. 18, 1916.) [112 $\frac{1}{2}$]

Certificate (of Comptroller) Directing Appeal.

To A. R. Titlow, Receiver of the United States
National Bank of Centralia, and United States
National Bank of Centralia:

You are hereby directed to appeal to the Circuit

Court of Appeals for the Ninth Circuit from the judgment of the District Court for the Western District of Washington, Southern Division, entered in the above-entitled cause on August 23d, 1915.

WITNESS the Honorable JOHN SKELTON WILLIAMS, Comptroller of the Currency, this 1st day of September, 1915.

JOHN SKELTON WILLIAMS,

Comptroller of the Currency.

[Seal of the Comptroller Currency Bureau, Treasury Department.]

By W. J. FOWLER,

Deputy Comptroller.

(Filed Nov. 3, 1915.) [113]

**Notice of Filing Defendant's Proposed Statement
of Evidence.**

To City of Centralia, a Municipal Corporation,
Plaintiff, Piles, Howe and Carey and W. N.
Beal, Esquires, It Attorneys:

You will please take notice that we have on this 11th day of February, 1916, lodged in the office of the clerk of the above-named court for your examination the statement of the evidence herein proposed by the defendants, A. R. Titlow, as receiver of the United States National Bank of Centralia, and the United States National Bank of Centralia to be included in the record on appeal in this cause.

AND YOU WILL PLEASE TAKE NOTICE that on the 2d day of March, 1916, at 10 o'clock A. M., at the courthouse of the above-named court in Tacoma, Washington, we will ask the Court or Judge

to approve the statement hereinbefore mentioned, a copy of which is herewith served upon you.

R. P. OLDHAM,

R. C. GOODALE,

Solicitors for the Defendants A. R. Titlow, as Receiver of the United States National Bank of Centralia, and The United States National Bank of Centralia.

(Acceptance of Service.)

(Filed Feb. 18, 1916.) [114]

Order for Preliminary Injunction.

This cause came on regularly and duly to be heard on the 25th day of January, 1915, on the motion of the complainant filed in this court and cause on the 19th day of January, 1915, for the issuance of a preliminary injunction. The complainant appeared by W. N. Beal, Esq., and Piles, Howe & Carey, its solicitors, and the defendant C. A. Snowden by A. R. Titlow, Esq., his solicitor. By consent of appearing parties the motion was heard on the verified bill of the complainant, and the oral testimony introduced by the appearing parties. And the Court, after considering the evidence submitted, and the arguments of counsel, and being now fully advised,—

IT IS ORDERED—*First*: That the defendant, C. A. Snowden, individually and as receiver of the defendant, The United States National Bank of Centralia, Washington, and each of his agents, servants and employees, be, and he and each of them hereby is, restrained and enjoined from applying by dividend, or otherwise, the sum of forty-four thousand

five hundred and fifty-three and 09/100 dollars (\$44,553.09) of the moneys now in his hands as such receiver, or in the possession of the comptroller of the currency, by reason of the receivership, to, or towards the payment in whole or in part of the indebtedness of the defendant bank, or otherwise, until the further order of this Court.

Second: That the defendant, C. A. Snowden, as such receiver, be, and he hereby is, directed and required to hold in his possession until the further order of this Court, the sum of forty-four thousand five hundred and fifty-three and 09/100 dollars (\$44,553.09), after making allowance for the expenses of administering the estate, to be paid to the complainant if it [115] shall be held upon the final hearing of this cause that the complainant is entitled to have said sum paid to it in preference to the general depositors and creditors of the defendant bank.

Third: That a preliminary writ of injunction in accordance with the provisions of this order be issued without the giving of any bond by the complainant; and that the defendant receiver certify to the comptroller of the currency the action of this Court in the premises.

To this order, and each and every part thereof, the defendant receiver duly excepted, and his exceptions are hereby allowed.

Done in open court this 8th day of February, 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Feb. 8, 1915.) [116]

Writ of Preliminary Injunction.

The United States of America,
Western District of Washington,—ss.

The President of the United States of America to
C. A. Snowden, Individually and as Receiver of
The United States National Bank of Centralia,
Washington, Greeting:

WHEREAS, the City of Centralia, a municipal corporation of the State of Washington, has filed on the equity side of the District Court of the United States, for the Western District of Washington, Southern Division, its bill of complaint against the United States National Bank of Centralia, Washington, and C. A. Snowden, as receiver of said bank, and has obtained an order for a preliminary injunction in said court and cause.

NOW, THEREFORE, we, having regard to the matters in said bill contained and the evidence submitted on the hearing of the motion of the complainant for preliminary injunction, do hereby command and strictly enjoin you, the said C. A. Snowden, individually and as receiver of The United States National Bank of Centralia, Washington, and each of your agents, servants and employees, from applying by dividend or otherwise, the sum of \$44,553.09 of the money now in your hands as such receiver, or in the possession of the Comptroller of the Currency by reason of your receivership, to or toward the payment in whole or in part of the indebtedness of the said The United States National Bank of Centralia, Washington, or otherwise, until the further order

of this Court; and you, the said C. A. Snowden, as such receiver, are hereby directed and required to hold in your possession until the further order of this Court, the sum of \$44,553.09, after making allowance for the expenses of administering the estate, of the moneys now in your hands as such receiver, [117] or in the possession of the Comptroller of the Currency by reason of your receivership, to be paid to the complainant, the City of Centralia, if it shall be held upon the final hearing of this cause that the said complainant is entitled to have said money paid to it in preference to the general depositors and creditors of the said The United States National Bank of Centralia, Washington, and you, the said C. A. Snowden, as such receiver, will make known unto the Comptroller of the Currency of the United States, the action of the Court in the premises; each of which commands and injunctions you are respectively required to observe and obey until our said District Court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court, this the 9th day of February, in the year One Thousand Nine Hundred and Fifteen, and of American Inde-

pendence the One Hundred and Thirty-ninth year.

[Seal]

FRANK L. CROSBY,
Clerk of the District Court of the United States, for
the Western District of Washington.

E. C. Ellington,
Deputy Clerk, U. S. District Court, Western District
of Washington.

(Filed Feb. 10, 1915.) [118]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Writ of Preliminary Injunction on the therein-named United States National Bank of Centralia, Washington, by handing to and leaving a true and correct copy thereof with George Dysart as Vice-president, personally, at Tacoma, in said District, on the ninth day of February, A. D. 1915.

JOHN M. BOYLE,
U. S. Marshal.
By Ira S. Davisson,
Chief Deputy.

Marshal's fees, \$2.00 [119]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Writ of Preliminary Injunction on the therein-named Clinton A. Snowden individually and as Receiver of United States National Bank of Centralia, by handing to and leaving a true and correct

copy thereof with Clinton A. Snowden, personally, at Centralia, in said District, on the 9th day of February, A. D. 1915.

JOHN M. BOYLE,

U. S. Marshal.

By Thos. J. Fleetwood,

Deputy.

Marshal's Fees, \$6.65.

*In the District Court of the United States, for the
Western District of Washington, Southern
Division.*

IN EQUITY—No. 25-E.

THE CITY OF CENTRALIA, a Municipal Corporation,

Plaintiff,

vs.

THE UNITED STATES NATIONAL BANK OF
CENTRALIA and A. R. TITLOW, as Receiver of Said Bank,

Defendants.

**Praeipie of the Plaintiff for Additional Portions of
the Record.**

To Frank L. Crosby, Clerk of said Court:

Please prepare, certify and transmit to the Clerk of the Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, a typewritten transcript of the record upon appeal in the above-entitled cause, containing in addition to the portions of the record requested by the defendants in their praecipe on file herein, the following (omitting all captions, endorse-

ments, verifications, etc., excepting file-marks) :

1. Order of the Court for preliminary injunction, filed in this court and cause on the 8th day of February, 1915.
2. Writ of preliminary injunction, filed in said court and cause on the 10th day of February, 1915, together with the return of the Marshal thereon.
3. Praecipe of plaintiff for additional portions of the record.

PILES & HOWE,
Attorneys for Plaintiff.

(Acceptance of service.)

(Filed Mar. 2, 1916.) [120]

Stipulation and Order as to Exhibits.

IT IS HEREBY STIPULATED by and between the parties hereto that all original exhibits introduced on the final hearing of this cause be transmitted to and filed with the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, for inspection by that court, and that none of said exhibits except those set forth in the statement of the testimony as now settled and now on file herein shall be copied in the printed record, but the residue thereof shall be treated as a part of the record in this cause upon the hearing of the appeal herein.

Dated at Seattle this 17th day of May, 1916.

WM. BEALS and
PILES, HOWE & CAREY,
Solicitors for Plaintiff and Respondent.
OLDHAM & GOODALE,
Solicitors for Defendants and Appellants.

It is so ordered.

Dated this 17th day of May, 1916.

EDWARD E. CUSHMAN,
Judge.

(Filed May 18, 1916.) [120a]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return the foregoing and attached to be a full, true and correct transcript of the papers and proceedings in the case of City of Centralia vs. United States National Bank of Centralia, Washington, and A. R. Titlow, as receiver of said bank, lately pending in this court, pursuant to the praecipes of counsel filed herein, as the originals thereof appear on file in this court at Tacoma, in the District aforesaid.

I further certify that I have attached hereto the original Citation issued in said cause.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and

charges incurred and paid into my office by and on behalf of the appellant herein, for making the record, certificate and return to the United States Circuit Court of Appeals, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 281 folios @ 15¢ ea. (required by praecipe of solicitors for appellants) and paid by them.....42.15

Clerk's fees (Sec. 828, R. S. U. S.) for making
record, certificate and return, 12 folios @
15¢ ea. (as required by praecipe of solicitors
for appellee and paid by them) 1.80

Clerk's certificate to transcript, 2 folios and
seal, paid by solicitors for appellants. 50

[121]

Clerk's certificate and seal as to original exhibits..... .35

ATTEST MY OFFICIAL SIGNATURE AND
THE SEAL OF THIS COURT, AT Tacoma, in the
District aforesaid, this 15th day of June, A. D. 1916.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,
Deputy Clerk. [122]

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

THE CITY OF CENTRALIA, a Municipal Corporation,

Plaintiff and Respondent,

vs.

THE UNITED STATES NATIONAL BANK OF
CENTRALIA, a Banking Association, and
A. R. TITLOW, as Receiver of Said Bank,
Defendants and Appellants.

Citation on Appeal (Original).

United States of America,—ss.

To the City of Centralia, a Municipal Corporation,
Greeting:

You are hereby notified that in a certain cause in equity in the United States District Court for the Western District of Washington, Southern Division, wherein the City of Centralia, a municipal corporation, is plaintiff and The United States National Bank of Centralia, a banking association, and A. R. Titlow, as receiver of said bank, are defendants, being cause No. 25-E., an appeal has been allowed to the defendants to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree entered in said cause on the 23d day of August, 1915, and you are therefore hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco in the State of California, within thirty days from the date of this citation, to show cause, if

any there be, why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said United States District Court this 11th day of February, 1916.

[Seal]

EDWARD E. CUSHMAN,

Judge.

Due service of the foregoing citation is hereby admitted by the plaintiff by its solicitors of record this 17 day of February, 1916.

PILES, HOWE & CAREY and

W. N. BEAL,

Solicitors for Plaintiff, City of Centralia, a Municipal Corporation.

Per S. H. P.

[Endorsed]: Original. In Equity. No. 25-E. In the District Court of the United States for the Western District of Washington, *Northern* Division. The City of Centralia, Plaintiff, vs. The United States National Bank of Centralia et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 18, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

*In the District Court of the United States, for the
Western District of Washington, Southern Di-
vision,*

and

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

IN EQUITY—No. 25—E.

THE CITY OF CENTRALIA, a Municipal Corpo-
ration,

Plaintiff and Respondent,

vs.

THE UNITED STATES NATIONAL BANK OF
CENTRALIA, a Banking Association, and
A. R. TITLOW, as Receiver of Said Bank,
Defendants and Appellants.

**Order Directing Transmission of Plaintiff's Original
Exhibit No. 11 to Appellate Court.**

On reading the stipulation filed herein between the parties that plaintiff's original Exhibit No. 11 be sent to the Circuit Court of Appeals in its original form,

IT IS ORDERED BY THE COURT that the clerk of this court be and he is hereby instructed to forward said original Exhibit No. 11 to the Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 15 day of May,
1916.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Original. In Equity. No. 25-E. In the District Court of the United States for the Western District of Washington, Southern Division. The City of Centralia, a Municipal Corporation, Plaintiff and Respondent, vs. The United States National Bank of Centralia et al., Defendants and Appellants. Order In re Exhibit No. 11. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. May 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

*In the District Court of the United States, for the
Western District of Washington, Southern Di-
vision,*

and

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

IN EQUITY—No. 25-E.

THE CITY OF CENTRALIA, a Municipal Corpo-
ration,

Plaintiff and Respondent,

vs.

THE UNITED STATES NATIONAL BANK OF
CENTRALIA, a Banking Association, and
A. R. TITLOW, as Receiver of Said Bank,
Defendants and Appellants.

**Stipulation Re Transmission of Plaintiff's Original
Exhibit No. 11 to Appellate Court.**

IT IS HEREBY STIPULATED by and between
counsel for plaintiff and respondent and counsel for

defendants and appellants, that original Exhibit No. 11 introduced on the final hearing of this cause in this court, be transmitted and filed with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, and that said exhibit be not copied into the printed record or printed or reproduced, but the same shall be treated as a part of the record in this cause upon the hearing of the merits in said appeal, which said exhibit is a transcript from the books of the United States National Bank of Centralia, showing the state of the account between that bank and the National Bank of Commerce, between the dates of July 11, 1914, and September 19, 1914, both inclusive, and consists of six handwritten folio pages.

Dated at Seattle this 28th day of February, 1916.

W. N. BEAL and
PILES & HOWE,

Solicitors for Plaintiff and Respondent.

OLDHAM & GOODALE,

Solicitors for Defendants and Appellants.

[Endorsed]: Copy. In Equity—No. 25-E. In the District Court of the United States for the Western District of Washington, Southern Division. City of Centralia, a Municipal Corporation, Plaintiff, vs. United States National Bank of Centralia et al., Defendants. Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 2, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2821. United States Circuit Court of Appeals for the Ninth Circuit. The United States National Bank of Centralia, a Banking Association, and A. R. Titlow, as Receiver of Said Bank, Appellants, vs. The City of Centralia, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed June 29, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2821.

THE UNITED STATES NATIONAL BANK OF
CENTRALIA, a Banking Association, and
A. R. TITLOW, as Receiver of the United
States National Bank of Centralia,
Appellants,

vs.

THE CITY OF CENTRALIA, a Municipal Corpo-
ration,

Respondent.

**Order Enlarging Time for Filing of Record to and
Including June 30, 1916.**

This cause having come on for hearing on this date

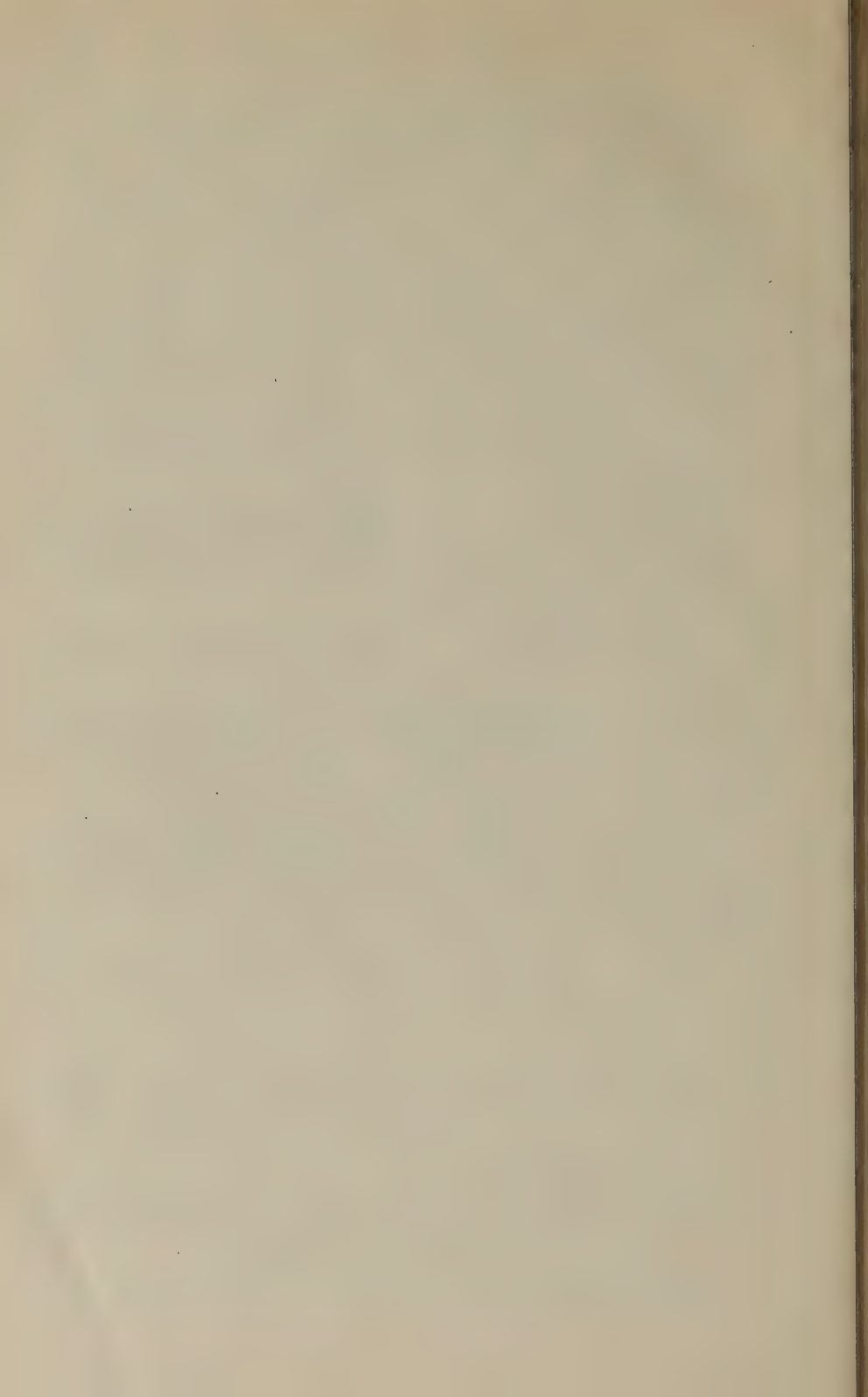
upon appellants' motion for an order enlarging the time within which appellants are required to file their record on appeal in this cause and docket the case with the clerk of this court, and good cause being shown, it is

ORDERED that appellants' time for filing the record on appeal in this cause and docketing the case with the clerk of this court be, and it is hereby, enlarged to and including the 30th day of June, 1916.

Dated at San Francisco this 28 day of February, 1916.

WM. B. GILBERT,
Judge of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: 2821. In the United States Circuit Court of Appeals for the Ninth Circuit. The United States National Bank of Centralia et al., Appellants, vs. The City of Centralia, a Municipal Corporation, Respondent. Order Enlarging Time for Filing Record. Filed Feb. 28, 1916. F. D. Monckton, Clerk. Refiled Jun. 29, 1916. F. D. Monckton, Clerk.



10

In the United States Circuit Court of Appeals

For the Ninth Circuit

A. R. TITLOW, as Receiver of the United States
National Bank of Centralia, Washington, and the
United States National Bank of Centralia,
Appellants,

vs.

THE CITY OF CENTRALIA, a Municipal Cor-
poration,
Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTHERN
DIVISION.

BRIEF OF APPELLANT

R. P. OLDHAM,

R. C. GOODALE,

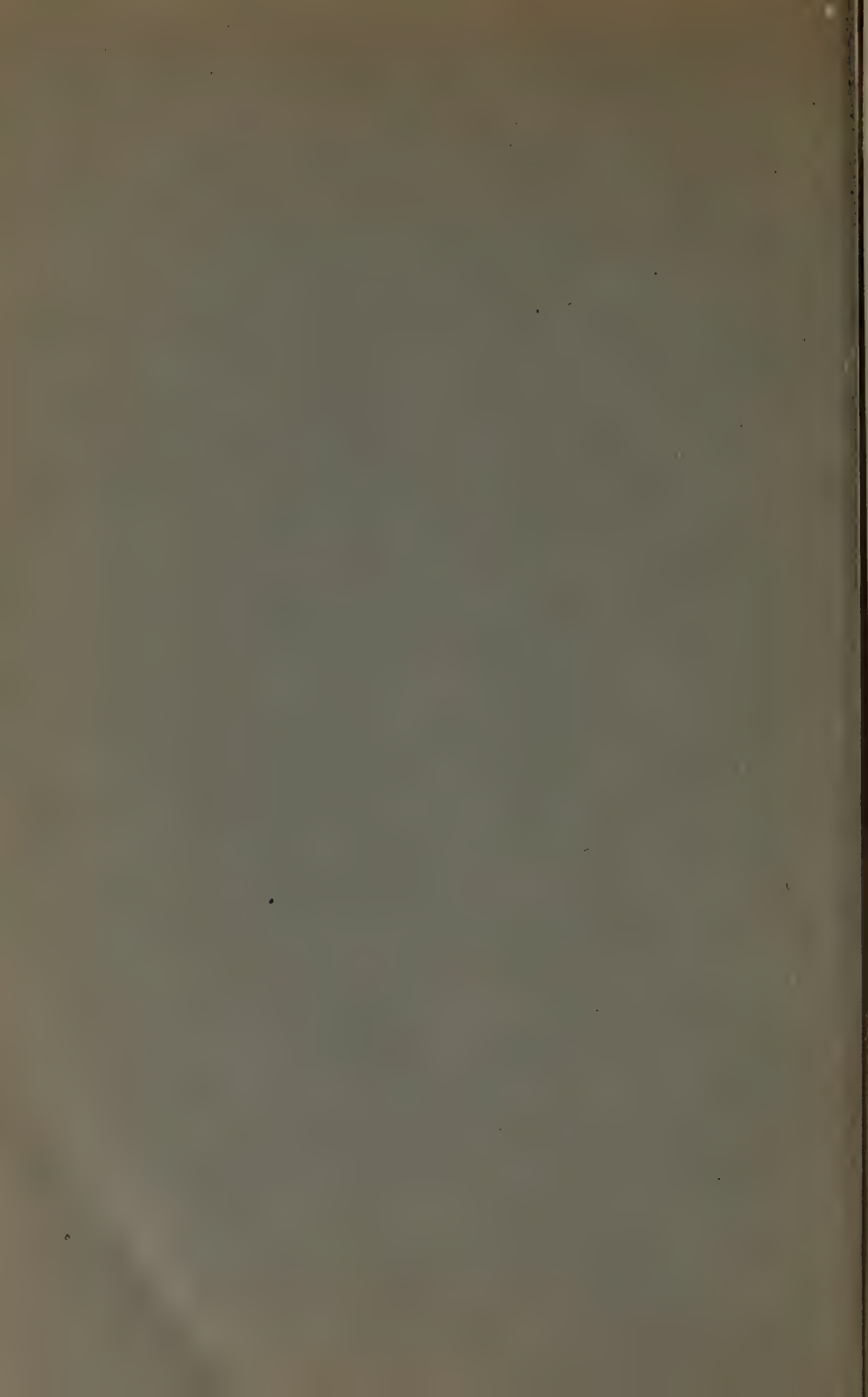
Attorneys for Appellants.

1408 Hoge Building, Seattle, Washington.

Sherman Printing & Binding Co. 71 Columbia Street, Seattle

SEP 2 - 1916

F. D. Monckton,
Clerk.



INDEX

	<i>Page</i>
STATEMENT	1
SPECIFICATION OF ERRORS.....	6
ARGUMENT	8
General Observations	8
Tracing fund	11
What became of credit balance Seattle.....	13
National Bank of Commerce.....	15
Bank of California.....	20
Bank of Italy	20
Continental & Commercial Bank.....	21
Authorities	21
Decisions in this Circuit.....	41
Fallacy of treating balances with reserve agents as cash	44
Relation of debtor and creditor.....	46
Form of decree	48
Conclusion	49

In the United States Circuit Court of Appeals

For the Ninth Circuit

A. R. TITLOW, as Receiver of the United States
National Bank of Centralia, Washington, and the
United States National Bank of Centralia,

Appellants,

vs.

THE CITY OF CENTRALIA, a Municipal Corporation,

Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTHERN
DIVISION.

BRIEF OF APPELLANT

STATEMENT

The City of Centralia issued certain water works bonds which it had sold to Carstens & Earles, of Seattle. On July 11, 1914, Mason, the city treasurer, delivered these bonds to the United States National

Bank, together with a sight draft drawn by Mason on Carstens & Earles for collection. The bank forwarded the bonds, with the draft attached, for collection and credit, to the National Bank of Commerce, one of its reserve agents and correspondent banks at Seattle (39). The Seattle Bank made the collection on July 13th (40). The amount was \$50,911.88, and on that day the National Bank of Commerce credited the United States National with this and other items aggregating \$55,000 (90). At that time the United States National was overdrawn with the National Bank of Commerce to the extent of some \$11,000, so that after securing this credit on July 13th, of \$55,000, including the item of \$50,911.88 in dispute in this action, there was at close of business on July 13th a credit on the books of the National Bank of Commerce to the United States National Bank of \$37,409.59 (77). Exhibit A (77) shows the state of account between these two banks from July 11th to July 22d. From this exhibit in general it appears that the United States National was making certain deposits and certain withdrawals from the Seattle bank, and that on July 22d the United States National had overdrawn its account and was indebted to the National Bank of Commerce \$632.77. The United States National utilized the credit that it had with the National Bank of Commerce between July 11th and July 22d, as

stated by the trial judge (32) in the ordinary course of business, and it "was drawn upon by the United States National Bank of Centralia, Washington, in carrying on its banking operations." Now, the books of the United States National showed that it still had a credit with the National Bank of Commerce until July 28th (42), on which date an overdraft occurred. It is immaterial whether we take the books of the Seattle bank or the Centralia bank in this connection. The Seattle bank's books would show the *actual* condition of the account between the two banks. The Centralia bank's books would include items that might have been in transit between the two banks. In any event, the credit that the Centralia bank had with its Seattle correspondent was exhausted in four different ways (89-111):

1. By drafts which were drawn by the Centralia Bank on its account with the Seattle bank in favor of creditors of the Centralia bank.

2. By the Seattle bank's cashing checks and other items drawn on the Centralia bank by Centralia's depositors.

3. By the transfer by the Centralia bank of a credit of approximately \$20,000 to the Continental Bank in Chicago, and a transfer of other credits from

the Seattle bank to the credit of the Centralia bank with correspondents in Tacoma.

4. There were charged back to the Centralia bank certain discount notes aggregating nearly \$15,000, which notes were (a) charged to Centralia's depositors' accounts, or (b) exchanged for renewal notes taken by Centralia and rediscounted by it with other banks and exhausted by subsequent overdraft by Centralia.

There was *no cash or securities of any kind transferred* directly or indirectly from the National Bank of Commerce to the United States National or its receiver as representing the proceeds of this collection.

On September 19, 1914, the United States National became insolvent. The comptroller appointed a receiver on September 21st.

At the time of its insolvency, the United States National had cash on hand \$27,000, together with various cash items, amounting to \$5,000 (100), \$1,000 of which had been collected, the remaining \$4,000 were uncollectible (102).

There was deposited in actual cash over the counter of the United States National Bank from July 28th to September 19th, \$130,000 (99). The total claims of creditors were \$1,200,000. A 100% assessment has been levied against all stockholders, and there are

not sufficient assets of the bank to pay creditors in full. There were preferred claims asserted against the insolvent bank aggregating over \$100,000 (111-114).

The city treasurer, Mason, was credited by the United States National with the \$50,911.88. He was notified of the credit on July 21st by the United States National (49). This account was subject to check and he was paid interest on it (50).

Other facts we do not deem material, but which the respondent does, are as follows:

Between July 13th, the date the collection was made at Seattle, and September 21st, the date of the insolvency of the United States National, the lowest amount of cash on hand, together with cash items in the vaults of the Centralia bank, was about \$22,000, on August 5th (47). The lowest amount of cash on hand and due from reserve agents was on September 17th of \$70,000.00 (47).

The United States National was designated as a city depository, but Mason had failed to get a bond from the bank sufficient to cover this account as required by law (49).

SPECIFICATION OF ERRORS

1. The District Court erred in finding and adjudging that the deposit of funds of the city with the defendant, United States National Bank of Centralia, without obtaining the bond required by the statutes of the State of Washington to secure their repayment, was sufficient to establish a trust relation or any other relation than that of debtor and creditor between the United States National Bank and the City of Centralia, or to give rise to a preferred claim against the bank upon its insolvency and failure to repay such funds.

2. The District Court erred in finding and adjudging that the sum of \$50,911.88, representing the proceeds of the sale of water bonds of the plaintiff city, or any part of such sum, was ever actually traced into the possession of the defendant bank or its receiver, or resulted in augmenting the assets of the bank coming into the hands of the receiver, or was used for any other purpose than the payment of the debts of the defendant, United States National Bank of Centralia.

3. The District Court erred in rendering a decree allowing a preferred claim to the plaintiff in the sum of \$44,553.09, which decree is contrary to the testimony and against the law, because the equities

of the case entitled the defendants to a decree of dismissal.

4. Even if the circumstances under which the plaintiff city's funds were deposited originally were such as to entitle it to a preferred claim, the District Court erred in finding and adjudging that that claim should be paid in full, and in directing the defendants to pay it without first ascertaining what proportion, if any, of the funds of the defendant bank on hand at the time of its failure was properly applicable to the payment of this claim, in preference to other preferred claims which the evidence shows were and are being urged against the defendant bank and its receiver.

5. Even if the proof showed that the circumstances under which the plaintiff's funds were originally deposited with the defendant bank were such as to create a preferred claim, and the funds were sufficiently traced so that that right to a preferred claim still subsisted at the time of the failure of the bank, the District Court nevertheless erred in finding and adjudging that the plaintiff was entitled to a preferred claim in any greater sum than the lowest amount of actual cash in the vaults of the defendant bank at any time between the date of the city's deposit and the day of the bank's failure.

ARGUMENT

General Observations

The right of the city to receive preferential payment out of the assets of the insolvent bank to the detriment of the general creditors must be based upon the principle that the proceeds of the collection formed a trust fund and that this trust fund was directly traceable to the assets which passed to the receiver.

Your Honors will bear in mind the following:

1. The collection was *not made directly by the United States Bank.*

2. The collection involved was made *three months* prior to insolvency.

3. No part of the collection either in cash or other thing of value was shown to have come into the possession of the bank or its receiver.

The decision of the trial court rests upon the now discredited and repudiated theory that in order to establish a trust fund against an insolvent bank it is only necessary to show that its receiver has obtained sufficient funds to pay it. In other words, that a trust will be decreed against *all the assets* of the bank. In furtherance of this theory, the trial court held that it was immaterial whether or not the proceeds of the collection found its way into the *actual*

possession of the United States National but that when the collection was made through its correspondent, the National Bank of Commerce, it was in fact received by the United States National; that it made no difference what subsequently became of this fund if the receiver had sufficient assets to pay the claim. The trial court rests its decision on Your Honors' ruling in *Merchants' National Bank vs. School District*, 94 Fed. 705, to which case we shall have occasion hereafter to refer.

The rationale of decision of the trial court repudiates the modern doctrine universally laid down by the Federal Courts and by the Supreme Court of the United States.

"They (claimants to trust fund) were under the *burden of proving their title*; if they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail. If their evidence *left the matter of identification in doubt, the doubt must be resolved in favor of the trustee who represented all of the creditors.* (*Schuyler vs. Littlefield*, 232 U. S. 710.)"

And in *City vs. Litchfield vs. Ballou*, 114 U. S. 190, the same court said:

"If the complainants go after the money they let the city have, they must *clearly identify* the money or the fund or other property which represents that money in such a manner that it can be re-claimed and delivered

without taking other property with it, or injuring other persons, or interfering with others' rights."

Your Honors have said:

"There is no recognized ground upon which equity can pursue a fund and impose upon it the character of a trust except upon the theory that *the money is still the property of the plaintiff*. If he is permitted to follow it it is because it is his own whether in the form in which he parted with its possession or in a substituted form. (*Spokane County vs. First National Bank*, 68 Fed. 979.)"

In a more recent case you said:

"But it is a general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust, *they must be identified*. (Citing authorities.) In carrying out the rule, when it comes to *proof*, the owner must assume the burden of ascertaining and tracing the trust funds, showing that the assets which have come into the hands of the trustee have been directly added to or benefitted by an amount of money realized from the sales of the specified goods held in trust, and recovery is limited to the extent of this increase or benefit. * * * So funds that have been dissipated or that have been used to pay other creditors, or that have been spent to pay current business expenses, are not recoverable, because they are gone and there is nothing remaining to be the subject of the trust." *In re Acheson*, 170 Fed. 427

In *Empire State Surety Co. vs. Carroll County*, 194 Fed. 593, C. C. A. 8th Cir. That court said:

"It is indispensable to the maintenance by a *cestui que* trust of a claim to preferential payment by a receiver out of the proceeds of an estate of an insolvent,

that *clear proof* be made that the trust property or its proceeds went into a specific fund, or into a specific, identified piece of property, which came into the hands of the receiver, and then the claim can be sustained to that fund or property only, and only to the extent that the trust property or its proceeds went into it. *It is not sufficient proof* that the trust property or its proceeds went into the *general* assets of the insolvent estate and increased the amount and value thereof which came into the hands of the receiver."

Tracing the Fund

With the above general observations let us apply these well recognized principles to the case at bar. *Has the city assumed and carried the burden of proof* of tracing and identifying any money or other assets in the hands of the receiver as the proceeds of the sale of the bonds to Carstens and Earles. The fact is the contrary. *The receiver has assumed the burden* which the Supreme Court and Your Honors have said rests upon the *claimant*. He has shown that *none of the fund* or its proceeds went from the National Bank of Commerce either to the bank or its receiver. The evidence affirmatively shows that the fund was actually dissipated prior to insolvency. It is true that as a matter of creating the relation of *debtor and creditor* the receipt by the correspondent bank is receipt by the United States National, but *the fact is* that no funds or credits in the hands of the Centralia bank were mingled with any balance in the National Bank of

Commerce. Can the court say that the \$27,000 in cash in the vaults of the Centralia bank contained any part of the collection made in Seattle? Was any part of these cash items of some \$5,000 which passed to the receiver, and of which the evidence shows \$4,000 are uncollectible, a part of this asserted fund or the proceeds from it? Surely this cash on hand cannot belong to two claimants.

Your Honors have said recently, August 7, 1916, that \$1,296 of it belong to one Sundquist. The trial court has said that \$10,000 of it belong to one McCormick. And the record discloses that preferred claimants to the extent of \$100,000 all claim that this money is theirs (111-114).

Now the proceeds of the City's collection went in the form of a credit to the United States National in the National Bank of Commerce at Seattle. A part of this was immediately used in wiping out a debt which the United States National had with the Seattle bank on July 13th. For, after depositing the proceeds of this collection and other items aggregating in all \$55,069.77, the balance in favor of the United States National in the Seattle bank was \$37,409.59 at the close of business on July 13 (76). Had that fund remained with the Seattle bank until the insolvency of the Centralia bank and had been paid to

its receiver, the trust fund might be said to have been traced. But *that is not the fact*. We are concerned then with the state of the United States National account with the Seattle bank. This, in turn, is limited to the period of time ending July 22d, or at the most July 28th, when that account was wiped out and an overdraft occurred. What may have been the *subsequent* dealings between the United States National and the National Bank of Commerce is of no concern. This was the view of the trial court and it was correct.

As said in *Board of Commissioners vs. Strawn* (157 Fed. 49, C. C. A. 6th Cir.):

“It is therefore a part of the rule applicable to following appropriated money into a bank account that, if at any time during currency of the mingled account the trusts used had left a balance less than the trust money, the trust money must be regarded as dissipated except as to this balance, the sums subsequently added to the account from other sources not being attributed to the trust fund.”

What Became of This Credit Balance in the Seattle Bank

Remember that this fund started with \$43,998.13 on July 13th. The trial court said it was used:

“In the ordinary course of business this balance was reduced by withdrawals, by draft directly from the United States National Bank, by the National Bank of Commerce cashing checks upon the United States National Bank drawn by its depositors and

by drafts drawn by the United States National Bank in favor of other correspondent banks and reserve agents until, on July 22d, 1914, according to the books of the National Bank of Commerce, the account was again overdrawn."

Between the dates of July 11th and July 28th the City's own testimony (57) shows that the Centralia bank shifted credit balances from the National Bank of Commerce to only *three other banks*, although in the transaction of its business the Centralia bank was during that time keeping accounts with *at least twenty-five other banks* (44, 59). These three to which the transfer of credit in favor of the Centralia bank occurred were as follows:

\$62,500 to the Bank of California at Tacoma. \$20,000 to the Continental and Commercial National Bank of Chicago, and \$15,000 to the Bank of Italy at San Francisco, aggregating \$97,500.

It would be a violent assumption to say that the City's collection was a part or all of this \$97,500 so shifted to the other three banks, but we will show your Honors that even these transfers of credit to the three banks in Tacoma, Chicago and San Francisco were soon dissipated and never reached the Centralia bank in any substituted form or thing of value.

Eliminating for the time being these transfers of credit to the three banks above specified let us return to the remaining balances in the Seattle bank.

National Bank of Commerce

The withdrawals from this account are itemized in defendant's "Exhibit A" (77). See also Exhibits G and H. They are explained in the testimony (90). \$12,225, represented three notes of \$3,610, on July 13th, and two notes of \$4,870 and \$3,745 on July 15th. These three notes were what was known as Wallville paper and acceptances by the Eastern Railway and Lumber Company. They had been discounted with the United States National and then re-discounted by that bank with the National Bank of Commerce. On the respective due dates the three notes were charged back to the United States National and sent that bank. Now, did the United States National in turn *collect the notes*? If it had and the funds had remained in the hands of the bank and its receiver it might be said that so much of this fund of \$50,000 had been directly traced. But the testimony shows that these notes were not only *not collected* but also that *they again passed out of the United States National* and were absorbed by overdrafts in other banks (90). These notes formed part of an issue of \$20,000. After the return of the three above notes to the United States

National a new issue by the same makers and acceptors took the place of the old ones. But this new issue was made up of different amounts and exactly what became of these items it is impossible to say. Two of the renewal notes, aggregating \$8,000, were re-discounted at the National Bank of Commerce on July 23d. Two more, aggregating over \$8,000 were re-discounted at the Continental & Commercial Bank of Chicago, another one of approximately \$5,000 was sent to the First National of Portland (91). The two that went back to the National Bank of Commerce were credited by that bank to the United States National on July 23d, and on July 29th the United State National *was again overdrawn* with the National Bank of Commerce (91). The one that was sent to the bank at Portland was credited on July 23d but six days afterward the United States National was overdrawn at the Portland bank (92). The two that went to the Chicago bank were sent out on July 23d and were credited by the Chicago bank to the account of the United States National about eight days afterward. As to this account with the Chicago bank we shall refer to hereafter. The city had tried to trace these three notes and was unable to do so (70).

The next items on this Exhibit down to the \$10,000 withdrawal on July 14th all fall under the head of

the withdrawals that were made as stated by the trial court "by the National Bank of Commerce cashing checks upon the United States National Bank drawn by its depositors." The customary method would be that a depositor of the United States National desiring a draft would draw his check on his own account in the United States National and secure a draft on the Seattle correspondent. *This, of course, was a direct withdrawal of funds.* The United States National was paying its debts to other creditors, it was dissipating its credit balance.

Then came the transfer of credit, aggregating \$20,000 to the Continental & Commercial Bank of Chicago on July 14th. On the 15th, \$7,500 was transferred to the Bank of California, Tacoma, and \$10,000.75 on that date to the Continental & Commercial Bank of Chicago.

All the other withdrawals down to an item of \$2,500 on July 21st were of the same nature as the petty withdrawals already explained, by minor drafts purchased by customers and the cashing of checks by the National Bank of Commerce, drawn on the United States National.

The \$2,500 withdrawal on July 21st was a discount note of the Chester Snow Company which had been charged back to the United States National and

the note was returned to the United States National upon its falling due. Upon its return to the United States National it was carried by that bank until July 28th when it was *charged to the account of the maker*, the Chester Snow Company, who was a depositor in the United States National. It appears that the Chester Snow Company was overdrawn and indebted to the United States National, at the time of insolvency, to the extent of \$80,000 (98). The depositor is in the hands of a receiver and it is doubtful if it will even pay preferred claims (98). *The bank has never collected anything from that company or from anyone else on account of it* (98).

The next few withdrawals, on July 21st and 22d, up to the time of the overdraft consisted in the main of three large items, \$4,941.83, \$400.92 and finally \$2,948.75. These three withdrawals represent the payment of checks drawn on the United States National by its depositors (98, 99). If we continue this examination of the account in Seattle until July 28 when the account was overdrawn, according to the Centralia bank books, we will find the credit was being exhausted in a similar method. Exhibits G and H, Record p. 9104.

*Summary of Withdrawals from National Bank of
Commerce*

Summarizing the exhaustion of credit that the United States National had with the National Bank of Commerce between July 11th and 22d, we find that it was exhausted in three ways.

First. By various banks honoring checks drawn by depositors of the United States National on their respective accounts in the United States National. Simplified this means the payment of the United States National's debts to its depositors. The amount of the credit thus exhausted was \$45,533.42.

Second. The return of re-discounted paper, Wallville \$12,225 and Chester Snow \$2,500, being a total debit of \$14,725, all of which paper became dissipated or worthless and was never collected by the United States National.

Three. By the transfer of credits to three other correspondent banks (See post 14).

Other withdrawals of this credit balance is limited to items of less than \$100. They are small. It is sufficient to state that the testimony (92-99) shows that none of these small items were transfers of money or other thing of value to the United States National.

They usually represented purchases of drafts by depositors of the bank.

Transfer to Bank of California at Tacoma

Between July 11th and 22d there were credit transfers from the Seattle bank to the Bank of California in Tacoma aggregating \$35,000 (69). There were other heavy transfers between July 22d and July 28th. The United States National during this period was constantly overdrawn with the Tacoma bank. On July 20th the overdraft of the United States National with the Bank of California was \$8,241.54, on the 21st it was still overdrawn \$2,524.62, on the 24th of July it was \$3,004.54, on July 29th the overdraft was \$1,213.68 (109-110). See also (69). It thus appears that with the heavy overdraft in the Bank of California the United States National was paying that creditor by a transfer of heavy credits that it had with the National Bank of Commerce.

The Bank of Italy at San Francisco

The receiver obtained nothing from this source for at the time of insolvency it appeared that the United States National was indebted to the Bank of Italy in the sum of \$5,900 for which amount that bank has filed a claim against the receiver (100). The City of Centralia has failed to trace any transfer or

other thing of value from the Bank of Italy to the United States National.

Continental & Commercial Bank of Chicago

The credit balance with the Chicago bank was exhausted on August 6th when the United States National had an overdraft of \$13,047.39 and there is no testimony that there was a transfer up to that time of funds or anything else of value to the United States National (70).

Our Authorities

A bank is not like the ordinary trustee. In mingling supposedly trust funds *it is not mingling* the trust *res* with its own funds. The bank is the debtor of many persons. If the trust fund is mingled, it is mingled with the *funds of other depositors*. Therefore, if one creditor is to be paid in full this preferential payment must be made not at the expense of the *bank* but of *other creditors*.

The city is driven to the following position:

That the credit once obtained at a correspondent and reserve bank will be *presumed* to have passed into the hands of the receiver so long as credit balances remain and pass to the receiver from *all other* correspondent banks of the insolvent.

It boldly asserts that it does not care what became of the credit after the Seattle bank gave proper credit therefor to the Centralia bank. It says: "You at least used that credit balance to pay your creditors," and the facts show that the payment of the Centralia bank's creditors *was the very use made of the credit balance.*

If the receiver obtained from the Northwest National Bank of Minneapolis (one of the United States National reserve agents, 44) any funds, is there any legal fiction that will fasten to that fund a trust in favor of the city?

With the burden resting upon the city to trace and identify the proceeds of her collection either in the original form or in some substituted form, it is not sufficient that it show a mere augmentation or swelling of assets, nor is it entitled to a lien against the *general assets* in the hands of the receiver. It is the city's duty to trace, by *clear* and *satisfactory* proof, the trust *res* in the receiver's possession. Some of the earlier cases, including those from this circuit, fell into error in this respect, as we will show later.

This general rule is stated in *Peters vs. Bain*, 133 U. S. 670, which was a suit to recover misappropriated trust funds. Bain & Company, a copartnership in control of the Exchange National Bank, had appropriated practically all the assets to their own purposes. That

was a suit by the receiver of the bank to impress a trust on the assets of the partnership, which had assigned for the benefit of creditors. The property which was sought to be recovered fell into two classes, the first relating to property which was purchased with moneys that could be *identified* as belonging to the bank, and second, that which was bought and paid for by the firm out of a *general mass* of moneys in their possession, and which *may* or may not have been made up in part of what had been wrongfully taken from the bank. The trust was held established as to the first property, which was directly traceable to the assets of the bank. As to the second class the court said:

“Some of the money of the bank *may have gone into this fund*, but it was not distinguished from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. Purchases made and paid for out of a general mass cannot be claimed by the bank, *unless it is shown that its own moneys then in the fund were appropriated for that purpose.*”

In *Empire State Surety Co. vs. Carroll County*, 194 Fed. 593, C. C. A. 8th Cir., Judge Sanborn states four rules governing this class of cases:

“1. The claimant must prove clearly that the trust property or its proceeds went into a specific

fund or specific property, which came into the hands of the receiver. It is not sufficient to prove that the trust property or the proceeds went into the general assets and increased the amount coming to the receiver.

"2. If trust funds are mingled in a common fund, and payment is made out of that fund, claimant can recover not exceeding the smallest amount the fund contained subsequent to the commingling, since the presumption is that the trustees kept the trust fund sacred.

"3. For this reason the legal presumption is that promissory notes and other paper coming into the hands of the receiver were not procured by the use of trust property.

"4. Where the property of many *cestuis que trustent* is mingled, and payment made out of the common fund, the presumption is that the moneys were paid out in the order they were paid in, and *cestuis que trustent* are entitled to preference in the inverse order of their payments into the fund. First in, first out."

That case involved various claims founded upon different facts. Judge Sanborn said:

"They next claim that they are entitled to preferential payment of about \$12,000.00, first, because \$4,455.05 was owing on the notes discounted by the Bank between June 11, 1908, and October 17, 1908, which came to the hands of the receiver, but the claim to such an allowance on account of these notes is forbidden by the third rule and by the fact that there is no evidence tracing any of the county deposits or any of the proceeds of them into any of these funds; second, because the receiver collected \$1,763.77 from credits to the First National Bank in other banks, but no preference on this account may be allowed for the same reason; and third, because \$5,912.05 in cash came into the hands of the receiver

when the bank failed, but the allowance of a preference on this account is forbidden by the fourth rule, and by these facts: All of the deposits of the county were made prior to October 10, 1908, except a deposit made on that day of tax receipts aggregating \$1,041.22, and checks of third persons aggregating \$486.11, and a deposit made on October 17, 1908, of \$1,604.88 in checks. It was for these two deposits that the preference of \$3,132.21 was allowed to the sureties by the court below. But this record has been searched in vain for any evidence that the checks for the \$1,604.88 deposited on the last day the bank was open ever went into the hands of the receiver, and no claim is made to recover these checks, nor can any evidence be found sufficient to show what banks these checks were drawn upon, or that any moneys derived from them ever went into the \$5,912.05 or into the hands of the receiver. Proof that these checks augmented the cash that went into the hands of the receiver, or that they produced cash which he obtained, was indispensable to any preference on their account. But checks of third persons on the bank with which they are deposited, which are paid by crediting the bank and charging the drawers on the books, fail to increase the cash in its possession, and form no basis for preferential payment to the depositor. *Beard vs. Independent District of Pella City*, 88 Fed. 375. Moreover, the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts, bring no money into its fund of cash, and form no foundation for preferential payment to the depositor. *City Bank vs. Blackmore*, 75 Fed. 771. Again checks of third parties, deposited with the bank credited to the depositor, and collected through a clearing house, lay no foundation for a preferential payment, in the absence of proof of them, for they may have been and usually are used, in whole or in part, to discharge the debts of the bank (citing authorities). These

checks may have been, and the probability is much greater than most of them were, used for some of these purposes than it is that cash for them was paid into the bank and remained there at the close of the day and went into the hands of the receiver."

An analogous case to the one at bar was that of *American Can Co. vs. Williams*, C. C. A., 2d Cir., 178 Fed. 420. Preference was claimed against the receiver of an insolvent bank on the following grounds: Plaintiff forwarded to the Fredonia Bank for collection certain drafts on two local corporations, aggregating some \$28,000. The bank collected the drafts in the following manner: First, drafts paid by the drawees' check on outside banks, made payable to the Fredonia bank, and subsequently *paid directly to defendant as receiver*. Second, drafts paid by the drawees' checks on outside banks, made payable to the Fredonia bank, and paid by the former to the latter *before* the appointment of a receiver. Third, drafts paid by the drawees out of their accounts as depositors of the Fredonia bank. *Fourth, drafts paid by the drawees' checks on outside banks made payable to the Fredonia bank, and indorsed and delivered by it to the Merchants Exchange National Bank of New York City, and credited by the Merchants bank to the Fredonia bank.*

Your Honors will perceive that the fourth state of facts is identical with those at bar.

It was further *conceded* in the case that

“At all times mentioned in the complaint prior to the 20th day of June, 1905, the assets of the Fredonia Bank and the assets which came into the defendant’s hands as receiver and which are now in his hands, exceeded the amount of the plaintiff’s claim.”

The court assumed that the proceeds of certain of these drafts did come into the possession of the bank *before* the receivership *and constituted trust funds* in its hands, but the court says:

“The difficulty is, upon the agreed statement of facts, in following such funds into the hands of the receiver. *It may be* that prior to the receivership the bank used the trust fund to pay its debts with. It may be that these funds were wholly dissipated. *There is absolutely nothing to show that they had any connection with any of the property which came into the possession of the receiver.* The stipulated facts are wholly insufficient to show *any identity* of the property followed with the funds sought to be charged against it, or to show that the amount of such property was increased or augmented by such funds. While the right to follow misapplied moneys as trust funds into the hands of a receiver has been extended in the modern decisions, there has never been in the federal courts a departure from the principle that there must be some identification of the property followed with the trust funds. * * * If the plaintiff’s contention is well founded, that to follow misappropriated moneys it is only necessary to show that a receiver has, and that the trustee had, assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate, and to adopt this view would do away with all the equitable principles out of which the right to follow trust funds grew.”

In *City Bank vs. Blackmore*, 75 Fed. 771, C. C. A. 6th Cir., it appeared that the plaintiff City Bank sent a draft on August 24, to the Commercial National Bank of Nashville. The draft was drawn on Latham & Co., of New York, and was for \$5,000.00. The Commercial Bank, then insolvent, received the draft August 25, credited the City Bank, and immediately sent the draft to the Bank of the Republic, its New York correspondent, to be deposited to the Commercial Bank's credit. Later in the day, August 25, the Commercial Bank was closed. The New York bank credited the draft to the Commercial Bank August 27. The City Bank stopped payment on the draft August 26. Accordingly the drawee refused to pay, but later, by direction of the City Bank, paid when the New York Bank brought suit against the City Bank on the draft. The City Bank then presented a claim to the receiver and asked that \$5,000 be allowed as preferred. Judge Taft, in holding the City Bank not entitled to priority, said:

"But the difficulty with the complainant's position is that neither the draft nor the proceeds of the draft have come into the receiver's hands. The sole question is therefore whether the *credit* thus secured by the Commercial Bank and its receiver by the draft entitles the City Bank to take \$5,000 out of the assets held by the receiver. The question must certainly be answered in the negative in any view which can be taken, unless it appears that the assets were in-

creased \$5,000 by the credit, or that the claims against them were so decreased that there was \$5,000 *more for distribution* among those who remained creditors after the credit than there would have been had no credit been given to the Commercial Bank for the draft. This does not appear. If no such credit had been allowed by the National Bank of the Republic, it would merely have been a claimant for \$5,000 more and would have been entitled, not to \$5,000 in full, but only to pro rata dividends on that amount. The benefit to the general fund from the draft, therefore, is limited to the amount of dividends payable on the \$5,000.00, and that amount the receiver has already allowed to the City Bank. It has no ground for complaint, therefore. No authority has been cited to show that a claim founded on fraud is entitled to *priority* over other claims. It is only where, by rescission of the contract out of which the claim arises on the ground of fraud, that the specific thing parted with or its proceeds can be sufficiently identified to be returned, that fraud seems to give a priority of distribution."

The opinion was concurred in by Mr. Justice Lurton.

By depositing a collection with a correspondent bank, does it make any difference whether the *debt to the correspondent bank* is reduced, or whether the *credit* with the correspondent bank is used to *pay other creditors*? In both instances the fund is lost. There is no greater amount for distribution among the general creditors. Instead of making A a creditor of the bank, B is made a creditor, and the substitution of parties is the only thing accomplished by the paper transaction. This question of tracing trust funds

against an insolvent was recently before the Supreme Court in *Schuyler vs. Littlefield*, 232 U. S. 710. The same case in the lower court, *In re Brown*, 193 Fed. 24. In the Circuit Court of Appeals the facts appeared as follows:

The bankrupts, Brown & Co., had converted certain stock belonging to the Princeton Bank. From the proceeds of the stock, Brown & Co. deposited \$1,120 in the Bank of Commerce and \$280 in the Hanover Bank. These transactions were on August 17 and August 24. The bankruptcy occurred at noon, August 25. The bankrupts also sold other stock of the Princeton Bank, and on August 13 had deposited the proceeds, \$1,787, in the Hanover bank. As to Brown & Co.'s deposits in the Bank of Commerce, it showed that there was a balance in favor of the bankrupts from August 17 to 24 largely in excess of \$1,120. The balance August 25 was \$21,000 but this was exhausted by checks subsequently presented, and the trustee received no money from that account. It further appeared that on August 25, though Brown & Co. had transferred \$4,000 from the Bank of Commerce to the Hanover Bank by check, there was nothing to show that the \$1,120 trust funds were included in this check and reappeared in the balance of \$2,000, *which balance the trustee in bankruptcy received from*

the Hanover bank. As to the deposit in the Hanover bank, the claim of the Princeton bank against this fund aggregated \$280, plus \$1,787, making a total of \$2,067. The balance on the books of the Hanover Bank in favor of the bankrupts on and after August 13 to August 24 *was largely in excess* of the sums due the Princeton bank. It was held, however, that a trust fund was not established, that there was nothing to show that these balances represented the trust money of the Princeton bank rather than the trust money of various other persons urging similar claims aggregating \$21,000. There was also nothing to show but that during the same day the balance had been entirely wiped out and the trust fund lost, and subsequent deposits would not make it good.

Your Honors will see the amazing similarity of the facts in the *Brown* case to those in the case at bar. *First.* The insolvent was dealing with two correspondent banks, in which correspondent banks the trustee had deposited the funds in dispute. *Second.* The alleged trust fund was represented by mere credit balances due the insolvent. The *Brown* case contains these *additional* facts, which were *favorable* to the claimant. *First.* The fund of \$4,000 had been transferred from one of the depositories to the other. *Second.* The trustee of the insolvent actually received in

cash over \$2,000 *after insolvency* from the second depository. As to the insolvent's account with the Bank of Commerce, that court said:

"If \$1,120 of the claimant's money was left in that bank, it has been dissipated and can be traced no further."

The claimant then asserted that by the transfer of the \$4,000 from the Commerce bank to the Hanover bank, his trust fund was *thereupon transferred to the Hanover bank*, and that the trustees in bankruptcy admittedly *received in cash the sum of \$2,055.97, this cash receipt included the claimant's \$1,120*. That court said:

"This seems a very tenuous presumption *in the absence of any evidence to support it*. The amounts are different. There is nothing to show that there was a sum of \$2,880 trust money of some sort with which the claimant's \$1,220 was being shifted by the bankrupts, for some unexplained reason, from one bank to another. As we said in *In re McIntyre*, Grace's appeal, 185 Fed. 96, 108, C. C. A. 540, while the doctrine of following trust funds has been much extended in modern decisions, there has never been a departure in the Federal courts from the principle that there must be some identification of the property sought to be charged with the trust fund. * * * The special master finds that 'The opening and closing balances in the Hanover bank on and after August 13, were largely in excess of these (2 deposits), *but the finding is not sufficient*. There is no reason why it should be *assumed* that these balances were being reserved because they represented the trust money of the Princeton bank rather than because they represented the trust

money of Simpson or Scotton or any of the others similarly situated, enumerated above (aggregating \$21,-783.39), or indeed any of the other claimants who from time to time have appeared in this proceeding seeking to trace and recover for property converted by the bankrupt. Moreover, it is not enough to show that there was a morning and afternoon balance for several successive days large enough to cover that amount of money which was improperly converted. It might very well be that on any one day checks were presented which exhausted the morning balance and its accretions, in which event these moneys would have been dissipated. We are not prepared to assent to the proposition that subsequent deposits are to be taken as having been made to make good claimant's money thus drawn and spent. *Board of Commissioners vs. Strawn*, 157 Fed. 51."

This case was affirmed in the Supreme Court in *First National Bank of Princeton vs. Littlefield*, 226 U. S. 110. The same case was also before the Supreme Court of the United States as to another claimant *sub nom Schuyler vs. Littlefield*, 232 U. S. 710.

The city relies upon *Commercial National Bank vs. Armstrong*, 148 U. S. 50. Same case, in the lower court, 39 Fed. 684, and a recent decision of the Circuit Court of Appeals for the Sixth Circuit, *Brennan vs. Tillinghast*, 201 Fed. 609.

To both of these cases we call the Court's respectful attention. Both cases are strong authorities for the defendants, recognizing that before one is entitled to a preferential claim, the trust fund must be clearly traced

and identified in the hands of the receiver, and the assets of the insolvent estate swollen to the extent of such fund. Both cases repudiate the doctrine that the payment of debts of the insolvent bank is either (a) a tracing of the fund, or (b) an inncrease of assets in the hands of the receiver.

In the Armstrong case a Philadelphia bank had a contract with a Cincinnati bank covering collections to be made on behalf of the Philadelphia bank. Some of these collections were to be made directly by the Cincinnati bank. Others were to be sent by the Cincinnati bank to its subagents for collections. The three questions as stated by the lower court under the facts in that case were, "1. What under their contract and course of business was the relation created by the two banks in respect to the commercial paper which complainant sent to the Fidelity bank for collection? 2. What if any change or modification of that relation was made or effected as to the proceeds of such paper as actual collections thereof by the Fidelity bank or its correspondent? and, 3, how far or to what extent can complainant follow and impress on the proceeds of such paper a trust such as will entitle it to recover out of the funds in the hands of the receiver?"

The lower court decided in answer to Question 1 that the relation of principal and agent existed. In

answer to Question 2, that after collection made the relation of debtor and creditor existed, and the third was referred to a special master who reported the facts as follows:

Said funds were mostly collected by "subagents of the Fidelity bank; that such subagents, having mutual accounts with the Fidelity bank, credited the latter with the amount of such collections, and at the date of the Fidelity bank's suspension it had credit balances with some and debit balances with others of such subagents." And further, that in those cases where there was a credit balance with such subagents, the accounts between said Fidelity bank and *such correspondents* exhibited a *continuous balance* due the former from the latter, down to the date of the Fidelity's failure, *as large or larger than the amount of the proceeds of complainant's said paper so collected and credited by said correspondents, and that after the receivership these amounts were subsequently paid over to and received by the defendant*, i. e., the receiver. For the amount, to-wit, some \$7,209.59, so collected by the subagents of the Fidelity and *paid over* by said subagents to the receiver of the Fidelity, the plaintiff was allowed a preferential claim. The balance of plaintiff's claim was allowed as a general creditor.

The Supreme Court in passing upon these facts said as to the paper handed subagents for collection by the Fidelity,

"The subagent collected it and held the specific money in hand to be delivered to the Fidelity bank. Then the failure of the Fidelity came and the specific money was handed to its receiver. That money never became a part of the general fund of the Fidelity. It was not applied by the subagent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected to be paid over to the Fidelity, or to whomsoever might be entitled to it."

At the time of the insolvency (of Fidelity) *"it had not fully performed its duties as agents and collected it. It had not received the moneys collected by its sub-agent. They were traceable as separate and specific funds, and therefore the plaintiff was entitled to have them paid out of the assets in the hands of the receiver; for when he collected them from these subagents he was in fact collecting them as the agent of the principal."*

It is true that court said that when the subagent made the collection and credited the amount thereof to the Fidelity, the moneys practically passed into the hands of the Fidelity, and that it was the same as if the money had actually reached the vaults of the Fidelity, but Your Honor will observe that this was for the purpose of determining in plaintiff status as a *general* creditor. That by such transaction plaintiff had a right

to assert a *general claim* for the money collected either by the Fidelity directly or by its subagents; for that Court further on says:

“We think, however, a more satisfactory reason is found in the fact that by the terms of the arrangement between the plaintiff and the Fidelity, the relation of *creditor* and *debtor* was created when the collections were fully made.”

The decision of the lower court was affirmed, allowing plaintiff a *preferred claim only to the extent* that collections had been made by subagents, and *the amount of such collections paid over by the subagent to the receiver*. Where the collections had been made by the subagents and *credited* to the account of the Fidelity, and this credit account exhausted prior to the insolvency of the Fidelity, the trust fund was held dissipated, and plaintiff relegated to the position of a general creditor.

The Armstrong case has been frequently cited by the Federal Courts on the question that a collection item sent by one back to another creates a relation of principal and agent until collected. That upon collection the relation changes to that of debtor and creditor.

Judge Taft, in *City Bank vs. Blackmore*, C. C. A., 75 Fed. 771, in which opinion Judge Lurton concurred,

cited the Armstrong case. In the Blackmore case the plaintiff sent to the insolvent bank an item for collection. This item was sent by the insolvent bank to the New York bank for collection and deposit. The New York bank collected the item and deposited its proceeds to the credit of the insolvent bank. The credit thus given by the New York bank reduced a debt owing it by the insolvent bank. The plaintiff claimed a preferred claim. The Court said:

"If the draft had come into the hands of the receiver, it would have been his duty and the court below would have doubtless compelled him to deliver the draft to the complainant, *but the difficulty with complainant's position is that neither the draft nor the proceeds of the draft came into the receiver's hands.* The sole question is therefore whether the *credit* thus secured by the Commercial bank and its receiver by the draft entitles the City bank to taking \$5,000 out of the assets held by the receiver. The question must certainly be answered in the negative in any view which can be taken, unless it appears that the assets were increased \$5,000 by the credit, or that the claims against them were so decreased *that there was \$5,000 more for distribution among those who remained creditors after the credit, than there would have been had no credit been given to the Commercial bank for the draft.* This does not appear. If no such credit had been allowed by the National Bank of the Republic, it would merely have been a claimant for \$5,000 more, and would have been entitled not to \$5,000 in full, but only to *pro rata* dividends on that amount."

"It may not be necessary to show earmarks upon the proceeds of the thing parted with to justify such

remedy, but it must at least appear that the funds in the hands of the receiver were increased or benefitted by the proceeds, and the recovery is limited to the extent of this increase or benefit. In every case relied on by counsel for appellant recovery, if decreed, was based on the fact that the property in the hands of the assignee or receiver of the person or bank against whom the claim of fraud, right to rescind and priority of distribution was made, *included in its mass either the very thing parted with or its proceeds.* *Armstrong v. Bank*, 148 U. S. 50."

The Circuit Court of Appeals in the Fifth Circuit, in *Richardson vs. Louisville Bank*, 94 Fed. 442, said that the instant case was controlled by *Bank vs. Armstrong*, and the complainant below was entitled to a decree for all items not *collected* by the American National Bank *before suspension*, and *afterwards* collected by subagents, *and traced to the possession of the receiver.*

In the Richardson case it appeared that a large number of the items had been collected *directly by the receiver* from the subagent banks. The same circuit decided the case of *Richardson vs. New Orleans*, 102 Fed. 785, and said:

"In *Bank vs. Armstrong*, 148 U. S. 50, a bank holding paper for collection passed into the hands of the receiver. The court held that the relation between bank and depositor as to uncollected paper was that of principal and agent, and that the money collected on the

paper *after the bank had closed, which had not been commingled with the general fund in the bank, could be reclaimed.*"

The Armstrong case was again cited in *Board of Commissioners vs. Strawn*, 157 Fed. 49, C. C. A., which was a suit to impress a trust on the assets of an insolvent national bank, of some \$48,000, being certain taxes collected by the cashier of the bank. It was *admitted* that the fund was a trust fund, and the only question was whether it could be traced.

"That the mis-use of this trust fund has gone to swell in one form or another the general assets of the bank is not enough to charge the whole with a lien, will not be seriously contested. The cases which deny such a contention are numerous, to impress upon a trust on a property of tortfeasor who has used the trust fund in his private affairs. It must be traced in its original shape or substituted form." (Citing the Armstrong case).

In the Brennan case the Ironwood bank wrongfully sold shares of stock belonging to the plaintiff. The proceeds of \$3,500 the Ironwood bank deposited with the Duluth bank. The American Express Company purchased drafts of the Ironwood bank amounting to \$2,800. These drafts were paid for by the American Express Company, and the drafts were drawn on the Duluth bank. The express company paid the Ironwood bank the amount of these drafts *in cash over its*

counter. The balance that the *Ironwood bank* always carried with the *Duluth bank* was in excess of the \$3,500, the amount of money received from sale of plaintiff's stock. The court recognizing the necessity of tracing trust fund, held that when money actually passed over the counter of the *Ironwood bank* of \$2,800, it was in effect a transfer of that much of the trust fund in cash into the *Ironwood bank*, and to that extent the trust fund would be traceable. Another interesting feature in the *Brennan* case was that the transactions above referred to occurred between May 1st and May 8th. The bank failed three days afterward, May 11th.

Decisions in This Circuit

The City will cite to Your Honors *Merchants National Bank vs. School District* (94 Fed. 705). The collection there was placed to the credit of the *Helena bank* in Boston. \$15,000 of this credit that *Helena* had with Boston was transferred to New York. A preferred claim was allowed. Your Honors said:

"The question is not complicated by any failure on the part of the Boston bank to pay the *Helena bank* in full the amount which it received. The *Helena bank* received the money in the due course of business."

In view of the statement of the Court above quoted and the condition of the record (see transcript of

record in that case, pages 56 and 59), it appears that the Helena bank either received the actual money, the proceeds of the collection, or that this money released securities from the Fourth National Bank of New York *which actually passed into the hands of the receiver*. The main question in the Helena case was whether or not the proceeds of the collection was a trust fund. The question of *tracing the fund* was not seriously considered by counsel on either side or by the court. The only Federal citations by the receiver were:

Philadelphia Bank vs. Dowd, 38 Fed. 173.
Bank vs. Armstrong, 39 Fed. 684, and
Bank vs. Insurance Company (not applicable),
 104 U. S. 54.

The claimant in that case cited *Commercial Bank vs. Armstrong* (148 U. S. 59), purely on the question of special deposit. He cited at length *San Diego County vs. California National Bank* (52 Fed. 59), where a trust was decreed against the *general assets of the insolvent bank* without an attempt to trace the fund. The San Diego case was repudiated by *Multnomah vs. Oregon National Bank* (61 Fed. 912). It was criticised in *re Marsh* (116 Fed. 396) and in *re Mulligan* (116 Fed. 715). Judge Gilbert in the Spokane County case (68 Fed. 979), said that the San Diego case among others laid down a doctrine to which this court could not assent. It was followed by the lower court

in the Beard case (83 Fed. 14), which was reversed by the Circuit Court of Appeals in 88 Fed. 375. Judge Sanborn in the Carroll County case (194 Fed. 604), says that the doctrine of that case and some others is "sustained neither by reason nor authority."

The claimant also relied on *Massey vs. Fischer* (62 Fed. 958), in which case Massey handed the cashier of the bank \$1,225 *in actual money for a specific purpose*. This money was *put into a drawer in the bank*. This occurred on April 30th. On May 8th, nine days afterward, the bank failed with \$34,000 cash on hand. At no time during the two dates did the bank have less than \$24,000 cash on hand.

The remaining case relied upon by the claimant in the Helena bank case was *Cleveland vs. Hawkins* (79 Fed. 29), which decreed a trust against all the assets of the insolvent bank. That case, however, was promptly reversed by the Circuit Court of Appeals in 89 Fed. 266.

Counsel for the City would construe the decision to mean that the proceeds of the School District's collection was dissipated in the ordinary exchange of credits between banks. It is preferable to give the case that construction which renders it consistent with the prior and subsequent decisions of Your Honors and

with the overwhelming weight of authority elsewhere. That is, that the Helena bank did receive *the proceeds of the collection*, as stated by your honors, and as shown by the record.

Finally, there is the case of *Moreland vs. Brown* (86 Fed. 257). That decision is criticised in 12 Har. Law Rev. 221. That case is not an authority for the one at bar for the following reasons:

First. There was an *express refusal* on the part of the plaintiff to have any *contractual relations with the Helena bank* which subsequently became insolvent.

Second. The wrong in that case *was committed by the receiver*. He co-operated with the New York bank in appropriating the \$2,600 belonging to the plaintiff. This \$2,600 reduced the balance which the Helena bank owed the New York bank and thus *enabled the receiver to release \$100,000 worth of securities* by the payment of \$4,000 instead of \$6,600 which he would have had to pay if the plaintiff's deposit had not been appropriated. In other words, by utilizing plaintiff's deposit *there actually came into the hands of the receiver securities of far greater value*.

Fallacy of Treating Balances With Reserve and Correspondent Banks as Assets

The City says that there should be treated as cash,

not only the actual cash in the vaults of the bank but the balances carried with reserve agents. It states that the insolvent Centralia bank *carried cash* with its reserve agents and cites a Federal statute relative to lawful reserve.

Now an examination of this statute discloses that a National bank may keep its lawful reserve in two ways:

(a) Either actual cash on hand in the vaults of the bank, or

(b) A certain per cent. of actual cash on hand and *balances* or credits of a certain per cent. with certain authorized correspondent banks. (R. S. 5191 and 5192).

“Three-fifths of the reserve of 15 per centum required by the preceeding section to be kept, may consist of balances due to an association, available for the redemption of its circulating notes, from association, approved by the Comptroller of the Currency, etc.”

The trial judge adopted claimant's theory, treating these balances due from reserve agents and correspondent banks *as cash on hand*. No authority can be cited to sustain this contention with the exception of a few early Federal and State cases since overruled or disapproved. By adopting such a view all collection items

of an insolvent bank would become trust funds. *The general depositors would receive nothing.* The court would have to resort to legal fiction and overlook the actual facts. As an illustration, it appears that among these balances due was over \$5,000 from the Bank of Italy at San Francisco on September 19th when the bank failed (102). But not only was this credit balance wiped out by counter charges but the Bank of Italy *actually filed a claim and was one of the creditors of the insolvent bank (102) to the amount of \$5,900 (100).*

Again let us suppose that the United States National was carrying all three-fifths of its lawful reserve, say \$150,000, in the shape of a balance due from one reserve agent. That after the failure of the United States National *this reserve agent failed*, paying ten cents on the dollar. Would the United State National be a preferred claimant against its reserve agent? No. One bank is simply a depositor in the other bank. The relation is that of an ordinary depositor, debtor and creditor. The fact is, the balances due from reserve agents and correspondent banks *are not cash* but are what the statute says, to-wit, balances due. The court is not justified in disregarding this fact and treating these balances as cash.

Did the transaction between the bank and the city

create any other relation than that of purely debtor and creditor?

On this question there is a conflict of authority, but there are some special reasons in this case upon which the court might well hold that the question of a trust fund is immaterial. Plaintiff relies upon the failure of the city treasurer to give a bond covering this deposit, and that the bank of course knew that under the law he was compelled to give bond for city deposits. The city therefore says that a peculiar relation existed which created an exception to the rule that a depositor in the bank is its creditor.

The court will recollect that the collection was made July 13th. It was not until August 31st that the city made any inquiry about it, and at that time the treasurer received the pass book with the amount credited to his account, just the same as any other depositor in the bank. Further it is shown that the bank *paid interest* on this account up to the time of its failure. Ordinarily speaking, a trustee who wrongfully deposits funds of his *costui que trust* in the bank has no greater rights against the bank upon its insolvency than that of a general depositor. It is also a well-known principle that where one has my money and pays me interest for the use of the money, the relation between the parties is that of debtor and creditor.

The city was acting wrongfully (through its treasurer). The bank was acting wrongfully in receiving the deposit without the proper bond. The parties were *pari delicto*. Should the general depositors of this bank be deprived of their proper dividends for the wrongful act of the city treasurer?

There is not doubt that the well reasoned cases on the subject hold that the relation is that of debtor and creditor.

Beard vs. Independent Dist. of Pella City, 88

Fed. 375, C. C. A. 8th Cir.

McNulta vs. West Chicago Park, 99 Fed. 900.

In re Salmon, 145 Fed. 649.

The early cases general gave municipal corporations preference for any deposit whether rightfully or wrongfully made. At the present time there is a diversity of opinion among the courts as to the right to treat a municipal depositor as a special one when it was wrongfully made. Why should the municipality have any superior right over the ordinary trustee of funds who wrongfully in breach of his trust deposits with the bank? In the last case it must be conceded that the trustee or the *cestui que trust* has no greater rights than that of a general depositor.

Form of Decree

The form of decree is objectionable in failing to take into account other preferred claims established

or in process of being established against the receiver.

In *Lucas County vs. Jamison*, 170 Fed. 338, the court said:

“But the court knows that there is still another on its docket in which a preference of more than \$100,000 is asked; so it will be seen that if preferences could be allowed in these cases, then the other cases involving so large an amount might cover the same funds.”

In *Cherry vs. Territory*, 89 ~~Pac.~~ 190 (Okla.), which is in other respects pertinent, the court said:

“But when the evidence in the particular case shows affirmatively that a party stands in the same position as others, as for instance in a receivership matter, and the court is passing upon the priority of claims, it should consider the effect of the particular judgment upon the other creditors similarly situated.”

Clark Sparks and Sons vs. Americus Nat. Bank,
230 Fed. 738.

CONCLUSION

We respectfully submit that complainant's position is sustainable only by an adoption of the discredited principle of impressing a lien upon all the assets of the delinquent trustee, regardless either of augmentation of the assets or identification of the fund. We have not found it necessary in this case to point out the apparent difference of opinion among the courts as

to whether more augmentation is sufficient without identification; and this for two reasons:

1. There was no swelling of the assets coming into the hands of the receiver in this case on account of the misappropriation, therefore the necessity for pursuing the inquiry as to whether that element alone is sufficient does not arise.

2. Even if the question were involved, it is not an open one in the Federal courts, as the authorities hereinbefore and hereinafter cited abundantly show.

The defendants assumed a burden which the law does not impose upon them, and affirmatively established that the trust res did not come into the hands of the bank. In view of this fact, the circumstance that the bank had on the various dates when the trust res was converted some separate fund into which the record shows the trust res did not come, is immaterial. The complainant having failed to point out either actually, or presumptively any res in the possession of the receiver to which it can assert a *property right*, its claim to any specific fund or piece of property must fail.

Upon the necessity of identification of the particular trust res sought to be reclaimed, in addition to the authorities hereinbefore cited, we beg to refer the court to the following:

- Litchfield vs. Ballou*, 29 L. Ed. 132; 114 U. S. 190.
- Peters vs. Bair*, 133 U. S. 670, 678, 679.
- Re Smith, Etc. Co.*, 159 Fed. 268, D. C. Wis., affirmed C. C. A., 7th Circuit, 170 Fed. 900.
- Re See*, 209 Fed. 172, C. C. A., 2d Circuit.
- Re Ennis*, 187 Fed. 728, C. C. A., 2d Circuit.
- Philadelphia National Bank vs. Dowd*, 38 Fed. 172, C. C. N. C.
- Board of Commissioners vs. Strawn*, 157 Fed. 49, C. C. A., 6th Circuit.
- Re Mulligan*, 116 Fed. 715, D. C. Mass. (quoted with approval by Gilbert, J.)
- In re Dorr*, 196 Fed. 292, 298.
- Re Marsh*, 116 Fed. 396, D. C. Conn.
- Beard vs. School District*, 88 Fed. 375, C. C. A., 8th Circuit.
- Lucas County vs. Jamison*, 170 Fed. 338, C. C. Iowa.
- Metropolitan National Bank vs. Commission Co.*, 77 Fed. 705, C. C. Mo.
- Re Larkin*, 202 Fed. 572, D. C. S. D.
- Multnomah County Case*, 61 Fed. 912, Ore.
- Gault vs. Hospital*, 89 Atl. 105, Md.
- Cushman vs. Goodwin*, 50 Atl. 50, Me.
- Bellevue State Bank vs. Coffin*, 125 Pac. 817, Idaho. (This case contains a full citation of authorities.)
- Red Bud Realty Co. vs. South*, 131 S. W. 340, Ark.
- Hewitt vs. Hayes*, 91 N. E. 332, Mass.
- Little vs. Chadwick*, 23 N. E. 1005, Mass.
- Lowe vs. Jones*, 78 N. E. 402, Mass. (This case was cited with approval in the Acheson case, 170 Fed. at 430. It contains a particularly illuminating discussion of the principles now under investigation.)

We think it not improper to advert to the importance of the case at bar to the receiver, and to the effect which an adverse decision will have upon the administration of his trust, especially in respect to the collection of outstanding debts due the insolvent bank. It involves to a very singular degree the welfare of this receivership. The fact that a complainant seeks to be preferred over three thousand other creditors, and that the establishment of its claim will be attended by consequences so injurious to numerous other persons alike unfortunate, may, it seems to us, properly be taken into consideration to the extent of requiring it to establish ~~her~~^{his} right by clear and convincing proof. And if the court shall feel any doubt upon the facts proved and the authorities cited, as to whether it has sustained the burden which the law imposes upon ~~her~~^{him}, as the Supreme Court of the United States said in *Schyler vs. Littlefield*, 232 U. S. 707, 713; 58 L. Ed. 806, 809, "the doubt must be resolved in favor of the trustee, who represents all the creditors."

Respectfully submitted,

R. P. OLDHAM,
R. C. GOODALE,
Attorney for Appellants.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES NATIONAL
BANK OF CENTRALIA, a Bank-
ing Association, and A. R. TITLOW,
as Receiver of Said Bank,

Appellants,

vs.

THE CITY OF CENTRALIA, a Mu-
nicipal Corporation,

Appellee.

No. 2821.

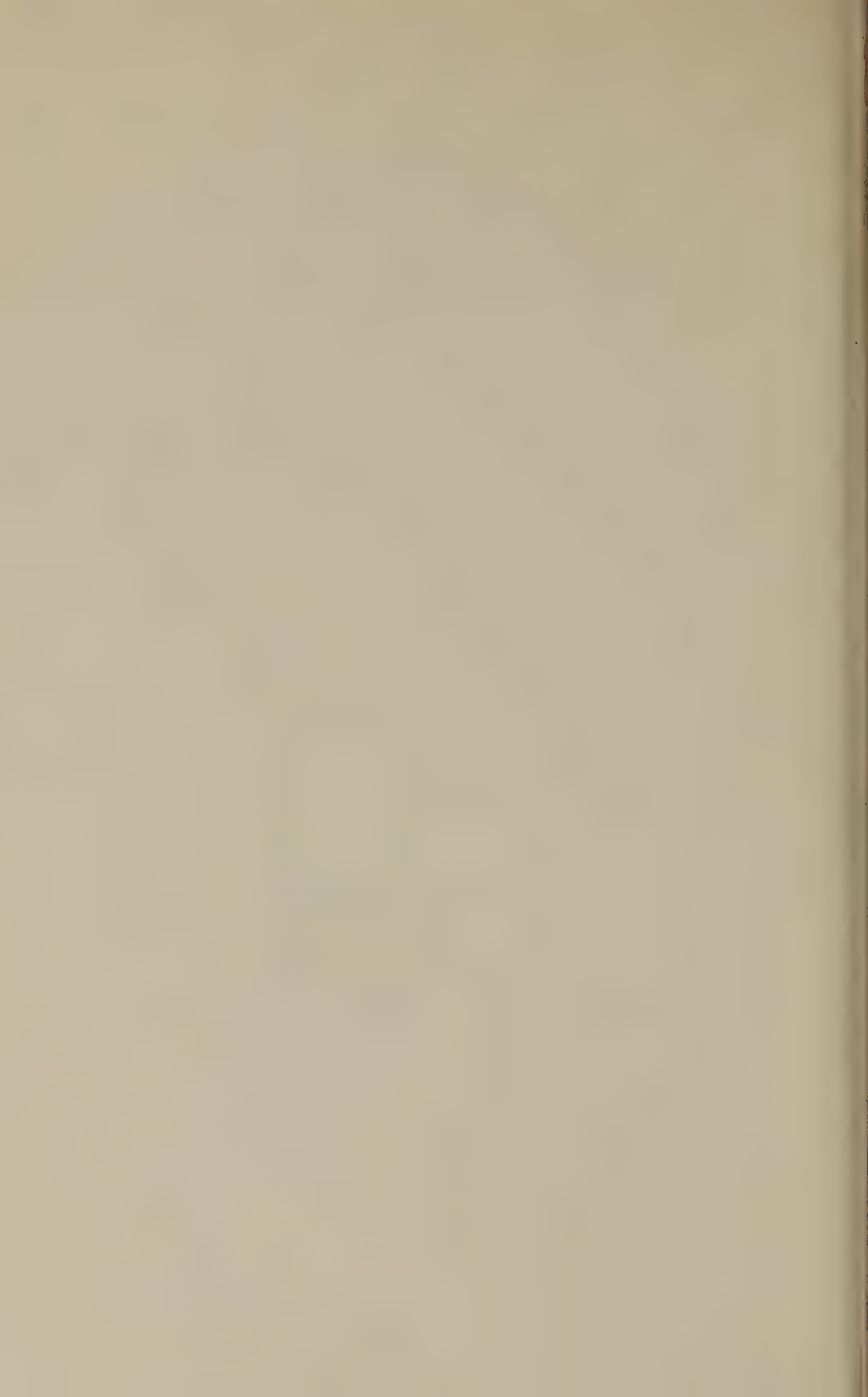
Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division

Appellee's Brief

WILLIAM R. LEE,
City Attorney for the City of
Centralia;

SAMUEL H. PILES, and
JAMES B. HOWE,
of Seattle, Wash.,

Solicitors for Appellee.



IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED STATES NATIONAL
BANK OF CENTRALIA, a Bank-
ing Association, and A. R. TITLOW,
as Receiver of Said Bank,

Appellants,

vs.

THE CITY OF CENTRALIA, a Mu-
nicipal Corporation,

Appellee.

No. 2821.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division

Appellee's Brief

STATEMENT OF THE CASE.

Appellee feels, in view of the statement contained in appellant's brief, that the facts and the statute relating to this case should be more fully laid before the court. The facts material to the decision of the points involved on the appeal of this suit are as follows:

The City of Centralia had and has a population of less than seventy-five thousand, and none of its funds could be lawfully deposited in any bank until such bank had been designated as a depository of public moneys and a bond given to secure the City against loss thereof, together with a contract whereby the bank agreed to pay not less than two per centum on the average daily balances, where such balances exceeded one thousand dollars, of all municipal funds kept by the city treasurer in said bank while acting as such depository.

The sections of the Washington statutes relating to the subject are as follows:

“77-681. Depositories Cities Other Than First Class. That any city or town of the State of Washington having a population of less than seventy-five thousand (75,000) inhabitants, shall upon a majority vote of its city council instruct its city or town treasurer, upon this bill becoming a law and annually thereafter at the end of each fiscal year or at such other times as may be deemed necessary by the treasurer, to designate one or more banks in the county wherein such city or town is located as depository or depositories of the moneys required to be kept by said treasurer.”

“77-683. Security. Before any such designation shall entitle the treasurer to make deposits in such bank or banks, the bank or banks so designated shall within ten (10) days after the same is filed with the comptroller or town

clerk, file with the comptroller or town clerk of such city or town a surety bond to such city or town in the maximum amount of deposits designated by said treasurer to be carried in such bank, or in lieu thereof shall deposit with the treasurer good and sufficient municipal, school district, county or state bonds, or warrants, or United States bonds, or local improvement bonds, or warrants, or public utility bonds or warrants issued by or under authority of any municipality of this state upon which interest or principal is not in default at the time of such deposit, or first mortgage railroad bonds listed on New York stock exchange, conditioned for the prompt payment thereof on checks duly drawn by the treasurer, which surety bonds or security shall be approved by the mayor and comptroller or town clerk of said city or town and such banks shall also at the same time file with said comptroller or town clerk a contract with said city or town wherein said bank shall agree to pay not less than two per centum on the average daily balances where such balances exceed one thousand (\$1,000) dollars of all municipal funds kept by such treasurer in said bank, while acting as such depository; such payments to be made monthly to said city or town while said deposits continue in said depository; said contracts shall run to said city or town and be in such form as shall be approved by the treasurer, mayor and corporation counsel."

"135-631. Every public officer, and every other person receiving money on behalf or for or on account of the people of the state or of any department of the state government or of any bureau or fund created by law in which the people are directly or indirectly interested, or for or on account of any county, city, town

or any school, diking, drainage or irrigation district, who—

“1. Shall appropriate to his own use or the use of any person not entitled thereto, without authority of law, any money so received by him as such officer, or otherwise * * * shall be punished by imprisonment in the state penitentiary for not more than fifteen years.”

“135-633. Every officer or other person mentioned in section 317 (135-631, *supra*) of this act, who shall willfully disobey any provision of law regulating his official conduct in cases other than those specified in said section, shall be guilty of a gross misdemeanor.”

“135-635. Every state, county, city or town treasurer who shall willfully misappropriate any moneys, funds or securities received by or deposited with him as such treasurer, or who shall be guilty of any other malfeasance or willful neglect of duty in his office, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than five thousand dollars.”

Pierce's Code, 1912.

The appellant bank prior to the deposit of the sum involved in this suit had been designated a city depository to the extent of ten thousand dollars only (Appellee's Exhibit No. 3, Tr. p. 50), and had given to the city a bond in that amount as provided by Section 77-683 of the foregoing statute. It never, however, entered into a contract for the payment of interest as provided by said section, al-

though it did in fact pay the interest prescribed by the statute. (Tr. p. 51.)

Prior to July, 1914, the City of Centralia authorized an issue of bonds in the sum of \$300,000 for the purpose of purchasing a privately-owned water system then operated within said city, and converting the same from a pumping to a gravity system and otherwise improving said waterworks for the use of itself and its inhabitants.

Carstens & Earles, Inc., of Seattle, had agreed to purchase the bonds upon delivery by the city from time to time as funds were needed to carry out the objects of the purchase. On or about July 11th, 1914, one Geo. B. Mason, the then city treasurer, delivered 105 of said bonds of the par value of \$52,500 to the appellant bank with a draft on Carstens & Earles, Inc., for the amount it was to pay for said bonds, with directions to forward and collect. The bonds were received by the bank, knowing the purpose for which they had been issued and that they had been issued pursuant to the provisions of an ordinance of said city. (Tr. pp. 39, 40, 49.)

The ordinance provided in substance that the bonds should be drawn solely for the purpose of paying the costs and expenses of acquiring, con-

structing, owning and operating a water system, and any surplus from the sale thereof should be applied to the payment of the principal and interest on the bonds themselves. Section 12 of said ordinance reads as follows:

“Section 12. The money derived from the sale of any of the bonds herein authorized, shall be paid into the said Centralia Water System Fund, as hereinbefore provided, and shall be drawn upon solely for the purpose of paying the costs and expenses of acquiring, constructing, owning and maintaining such water system, and all the costs and expenses connected therewith, and the surplus of the money, if any, from the sale of said bonds over and above the total costs of said waterworks system shall be applied to the payment of said bonds and interest thereon as the same mature.” (Tr. pp. 40, 41.)

The appellant bank never gave the city any security other than the depository bond for ten thousand dollars. (Tr. pp. 42, 49.)

About the 12th of July, 1914, the bonds were forwarded by the appellant bank to the National Bank of Commerce of Seattle, Washington, for collection with instructions to deliver same upon payment of a draft drawn on Carstens & Earles, Inc., and to credit appellant bank with the proceeds of the collection and advise it of the credit. The National Bank of Commerce of Seattle was not only

appellant's regular correspondent at Seattle, but one of its reserve banks. The draft was paid to the National Bank of Commerce July 13th, 1914, which bank thereupon gave the appellant bank credit for the amount collected thereon, \$50,911,88, and advised the appellant of that fact. On July 13th the appellant bank entered in its books a credit to the city treasurer for this amount, charging a like sum to the National Bank of Commerce.

The total deposits of the appellant bank with the National Bank of Commerce aggregated on that day more than \$55,000. (Tr. pp. 39-40.)

There had been for a considerable time \$1,000 to the treasurer's credit in the account with the appellant bank in which this collection was entered. Mason, the city treasurer, was absent from the City of Centralia at the time of the collection and entry of credit in his favor and the bank made the deposit to his credit without further advice from him. (Tr. p. 48.) Mason had no deposit slip showing the deposit and no pass book except one relating to the special account explained in his evidence, which pass book showed a balance by reason of said special account of \$2,638.31 to his credit. The city treasurer never intended to deposit the proceeds of

said bonds in the appellant bank without additional security. (Tr. pp. 48-49, 51.)

By July 21st Mason had returned to Centralia, and learning that the bank had credited him with the proceeds of the sale of the bonds he notified the bank that an additional bond would have to be given by it to the city on account of said deposit. This bond, however, was never given. The treasurer nor any one else ever drew against the account. (Tr. pp. 48-49-50-51.)

On the 19th day of September, 1914, appellant bank closed its doors, and on the 21st of September, 1914, it passed into the hands of a receiver. At the time it closed its doors it owned and was in the possession of certain improvement bonds and warrants theretofore issued by the city and which the city was required to pay, aggregating upwards of \$12,000.00, and which passed into the hands of the receiver upon his appointment.

On January 19th, 1915, appellee filed its bill of complaint in the lower court to restrain the receiver from applying any of the funds of the bank in his hands in payment of any of the indebtedness of the bank until the preferred claim of the appellee should be paid, and to impress a trust upon such funds, and further praying that the city

be permitted to offset a proportional amount of its claim against said improvement bonds and warrants should it be held that the city was not entitled to the relief which it sought.

On February 8th, 1915, an order for a preliminary injunction was made by the court, and on February 10th a writ of preliminary injunction issued commanding and enjoining the receiver from applying by dividend or otherwise the sum of \$44,553.09 of the money then in his hands, or in the possession of the comptroller of the currency, by reason of the receivership, toward the payment in whole or in part of the indebtedness of said bank until further order of the court, and directing and requiring the receiver to hold in his possession until further order of the court said sum after making allowance for the expenses of administration. (Tr. pp. 122 to 126, inclusive.)

The injunction was made perpetual upon final hearing, the court holding, however, that it was unnecessary to determine the right of offset with respect to said bonds and warrants, because the city was able to trace a sum in excess of the amount of its claim into the fund in the receiver's hands, and was therefore entitled to the relief sought.

The case is reported in 221 Federal Reporter, at page 755.

Upon the final hearing the lower court rendered the following opinion, which has not been published:

“CUSHMAN, District Judge.

“This cause was before the court upon application for a preliminary injunction (221 Federal, 751). It is not necessary to restate the facts of the case at length, or all of the conclusions reached.

“The city treasurer of plaintiff, July 10th or 11th, 1914, deposited with the United States National Bank certain bonds, with directions to collect the sale price from Carstens & Earles, Seattle bond buyers. The United States National Bank had no authority, for want of the statutory bond, to receive for deposit the proceeds of this collection. It sent the bonds to its Seattle correspondent and reserve agent, the National Bank of Commerce. That bank collected for the bonds and gave the United States National Bank credit for the proceeds, \$50,-911.88.

“On July 13, 1914, the total deposits by that bank with the National Bank of Commerce amounted to \$55,069.77. From July 11th, the account of the United States National Bank with the National Bank of Commerce had been overdrawn \$11,071.64. This overdraft was wiped out by these deposits, leaving a balance on that day of \$44,998.13. On this day, July 13th, the United States National Bank, being advised of the collection, gave the treasurer of claimant credit on its books for the amount, and charged a like amount against the National Bank of Commerce.

“In the ordinary course of business this balance was reduced by withdrawals, by draft direct from the United States National Bank, by the National Bank of Commerce cashing checks upon the United States National Bank, drawn by its depositors and by drafts drawn by the United States National Bank in favor of other correspondent banks and reserve agents until, on July 22, 1914, according to the books of the National Bank of Commerce, the account was again overdrawn. According to the books of the United States National Bank this overdraft did not occur until July 28th. This discrepancy is explained by the fact that on July 22nd there were remittances from the United States National Bank in the mails sufficient to offset this overdraft, which, on the books of the latter had been charged to the National Bank of Commerce.

“When the bank closed its doors, September 19, 1914, it had in its vaults \$32,439.44, which came into the receiver's hands. The smallest amount of cash in its vaults between July 13th and September 19th was \$23,527.86, on September 17th. Between July 13th and September 19th, there was at all times with its reserve agents and in its vaults more than \$50,911.88.

“The court has been asked to reconsider its former ruling: That the cash in its vaults and the amount of its reserves with its correspondents and reserve agents would be treated as one fund, and that the proceeds of the bonds traced into this fund would be presumed to remain there until the contrary was shown. It is contended that the amounts with its correspondents and reserve agents were merely debts

owing to the United States National Bank and a part of the general insolvent estate.

“A bank, which, in order to sell money at a distance, that is, deal in exchanges, for that purpose, keeps throughout the country deposits with various banks and has, by arrangement, a course of dealing with those banks—they cashing the drafts sold by it—has done more than to create the mere relation of debtor and creditor between itself and these banks.

“The decision in this case is controlled by *Merchants’ National Bank vs. School District No. 8* (94 Fed. 705), and *Moreland vs. Brown* (86 Fed. 257). The present case, in all its essentials, cannot be distinguished from *Merchants’ National Bank vs. School District No. 8*, decided by the Circuit Court of Appeals in this Circuit.

“On the argument of the present case it was contended, on behalf of the receiver, that, in the case of *Merchants’ National Bank vs. School District No. 8* (94 Fed. 705), the Merchants’ National Bank of Helena, Montana, which subsequently became insolvent, actually received into its vaults prior to insolvency, the cash collected by the National City Bank of Boston, and that, therefore, much that was said by the Circuit Court of Appeals in that decision was not necessary to the decision and should be treated as dictum. Included in which, I conclude, is the following extract from that opinion:

“‘It is contended that the finding of the master, to the effect that Palmer deposited with the bank the sum of \$13,056, is at variance with the facts as they are disclosed in the evidence. It appears from the evidence that the bonds were sold in

Boston, and that the sum realized thereon was deposited with the National City Bank of Boston, which bank was the correspondent of the Helena bank. The Boston bank notified the Helena bank that that amount had been placed to the credit of the latter by a letter which was received by the bank at Helena on July 11, 1896. On July 3rd the Helena bank had with the Boston bank a credit of \$39,011.60, against which it drew on that day the sum of \$10,000, leaving a balance of \$29,011.60, which was not further reduced until July 13th, when a draft of \$8,075 was drawn against it. On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for \$13,056, and requested that an account be opened as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. *It is not material in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank's correspondent in Boston, and that, upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the*

arrangement which was consummated. Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of \$13,056, and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund, subject to disbursement only upon the order of the school district (at pp. 707 and 708). (The italics are the court's.)'

“In the foregoing case the fund collected, decreed to be a trust fund, amounted to \$13,056. The receiver on his appointment took possession of \$19,533 in cash and collected from other assets \$200,000. An examination of the record and briefs in that case discloses that, at the time of the failure of the Merchants' National Bank of Helena, there was to its credit in the National City Bank, its Boston correspondent, only \$1,077.56. It was shown that no part of the actual money received by the National City Bank of Boston was ever received by the Merchants' National Bank of Helena. There was no evidence of other disposition of it than in the ordinary course it would probably be forwarded to New York or Chicago, on which points most of the exchange sold by the Merchants' National Bank would be drawn.

“Upon this state of facts, it was strenuously contended by the appellant in that case that no trust could be impressed upon the funds in the receiver’s hands because the money collected in Boston was not traced to the vaults of the Merchants’ National Bank of Helena but, in great part, to other banks and as there was no showing as to the amount of the fund in the vaults of the Merchants’ National Bank of Helena from the time of the collection in Boston to the receivership, nor evidence as to whether at all such times the cash in such vaults was equal or greater in amount than the collection.

“The record in that case being such, this court cannot conclude that any part of the language quoted was unnecessary to the determination of that cause and, under the rule laid down in that case and the *Moreland* case (86 Fed. 257) a trust will be impressed upon the amount in the vaults of the United States National Bank when it closed and upon the amount with its reserve agents and correspondents.

“Of the \$55,069.77 deposited with the National Bank of Commerce, \$11,071.64 was credited to the overdraft of the United States National Bank, reducing the amount for which a preference is established to \$44,998.13. Any presumption as to the cash assets of the United States National Bank coming into the hands of the receiver being increased to the extent of \$11,071.64 is negatived by the fact that this money was used in settling the prior indebtedness of the United States National Bank to the National Bank of Commerce, and the same presumption would not be warranted as in case of the greater balance created on account of the remainder of such collection. That which was

added to its assets can be presumed to remain as a part thereof until the appointment of the receiver; but that which is shown never to have become an asset cannot. There is no chance for the presumption to operate as to it.

“Upon the payment to the city by the surety company, giving the bond for the city’s deposit in the United States National Bank of \$10,000, the face of its bond, the city applied such payment so as to extinguish the debt of the bank on account of a special deposit in another account, \$2,641.21, leaving, of the bonding company’s payment, \$7,358.79 to be applied upon the city’s other account, in which the proceeds for the sale of the bonds had been credited.

“In this account there had been, long prior to the bank’s giving the city treasurer credit for the proceeds of the bonds, a deposit of \$1,000. This, with the \$50,911.88 collected for the bonds, made a total due the city in this account of \$51,911.88, subtracting from which the remainder of the surety company’s payment, \$7,358.79, reduces the amount to \$44,553.09, for which a preference is decreed.

“As already shown, the city has only been able to trace \$44,938.13 of the \$50,911.88 into the fund in the receiver’s hands; but, as that amount exceeds the total balance due it, after applying the payment made by the bonding company, it is not necessary to determine whether the city would be entitled to set off any part of its claim against certain warrants held by the receiver for money to be raised upon assessments in certain improvement districts within the City of Centralia.

“Findings and judgment accordingly.”

The evidence shows, and it is conceded that the appellant bank had not and has not sufficient money, property or assets to pay its indebtedness in full. The city realized on the \$10,000 surety bond given by appellant to secure deposits to the extent of that sum, which reduced the claim of the city, as shown by the opinion of the court, to \$44,553.09.

Between and including July 13th and September 19th, 1914, the lowest sum in cash on hand in the appellant bank was \$23,527.86, on September 17, 1914. (Tr. p. 44.)

The lowest sum in the reserve banks and the appellant bank on any day between and including July 13th and September 19th, 1914, upon any theory of the case, was the sum of \$69,141.80, there being then in the appellant bank \$23,527.86 and in the reserve banks the sum of \$45,613.94, or the total sum of \$69,141.80 on said date. (See Plaintiff's Exhibit 1, under date of September 17, Tr. p. 47.)

The reserve banks of the appellant bank between and including those dates were as follows: Chase National Bank of New York, National Bank of Tacoma, First National Bank of Portland, National Bank of Commerce of Seattle, Bank of California, Tacoma; The Continental & Commercial National Bank, Chicago; First National Bank of San Fran-

cisco, Northwestern National Bank of Minneapolis, Seattle National Bank of Seattle, Northwestern National Bank of Portland and Merchants' National Bank of Portland. (Tr. pp. 44-45.)

The earnings of the appellant bank between and including July 13th and September 19th, 1914, exceeded the expenses and losses of said bank in the sum of \$808.58.

The lowest amount of money in non-reserve banks of the appellant bank between and including said dates was on August 29th, 1914, \$10,938.18.

The books of the appellant bank show that on July 13th, 1914, debits to the National Bank of Commerce of Seattle were as follows:

Collection No. 5470.....	\$ 180.11
Collection No. 5472.....	50,911.88

and an item described as "sundries" of \$4,416.59, the total of these items being \$55,508.58.

The appellant bank deposited with the National Bank of Commerce in the month of July, 1914, \$184,102.01. (Testimony of E. G. Shorrocks, Tr. pp. 56 and 57.)

There was a transfer from the National Bank of Commerce to the Bank of California between and

inclusive of July 13th and July 28th, 1914, of \$62,500, and a transfer to the Continental & Commercial National Bank of Chicago of \$20,000, and a transfer to the Bank of Italy of \$15,000. (Tr. p. 57.)

On July 15th, 1914, the National Bank of Commerce was credited by the Centralia bank with \$12,225, which comprised three items, as follows: July 13th, \$3,610; July 15th, \$4,870 and \$3,745. These items represented notes which were sent by the National Bank of Commerce to the Centralia bank for collection. (Tr. p. 57.)

It was admitted at the trial that said notes were sent by the National Bank of Commerce of Seattle to the appellant bank for collection, and that the appellant's account with the National Bank of Commerce was charged by the National Bank of Commerce in the amount thereof and the appellant credited a like sum on its book to the National Bank of Commerce.

The amount of money on the dates mentioned in the National Bank of Commerce of Seattle to the credit of the appellant was reduced by these transactions in the sum of \$12,225, according to the books of the two banks. (Tr. pp. 57 and 58.) If the \$12,225 debit and credit had not been given no overdraft

would have existed, if any did in fact exist, on July 28th. (Tr. p. 71.)

Plaintiff's Exhibit No. 4, Transcript, pp. 59 to 64, inclusive, shows the transfers of money from the various banks that the appellant was doing business with, and shows the manner in which the appellant was kiting its funds from one bank to another between July 13th, 1914, and September 19th, 1914, both dates inclusive.

Plaintiff's Exhibit No. 5, Transcript, p. 65, is a statement showing the state of the account between appellant bank and the Bank of California at Tacoma, between July 12th and July 20th, 1914. A similar statement is shown between the appellant bank and the Continental & Commercial Bank of Chicago, between July 11th and August 14th, 1914, as plaintiff's Exhibit No. 6, Transcript, pp. 66 to 68, inclusive.

When the appellant bank failed it had in its own vaults in the bank at Centralia \$32,439.44 in cash, which passed into the hands of the receiver. (Tr. p. 87.) The \$12,225.00 notes referred to were charged by the National Bank of Commerce to the appellant bank and by the latter bank credited to the former bank, and the notes marked paid. (Testi-

mony of H. O. Johnson, Tr. p. 72; appellee's Exhibits 7 and 8, Tr. pp. 73 and 74.)

By letter of July 10, 1914, the appellant bank instructed the National Bank of Commerce upon making collection of the \$50,281.88 and interest on account of said 105 bonds to credit same to the account of the appellant bank. (Exhibit 9, Tr. p. 75.)

On July 22nd there was an apparent overdraft in the National Bank of Commerce of \$632.97, while the appellant bank had a credit on the 23rd day of July, according to the National Bank of Commerce books, of \$13,809.94. The appellant's bank book, however, showed that on July 22nd it had a credit of about \$13,000 in the National Bank of Commerce; this was because on that date certain items were in transit to the National Bank of Commerce. (Tr. pp. 79 and 80.)

Checks and drafts are treated by banks as actual cash and money deposited in reserve banks is treated as actual cash. (Tr. pp. 80, 81 and 86.)

Appellee's Exhibit No. 10 (Tr. pp. 84 and 85) is a statement of balances due from its various correspondents, according to its books, between July 13th and September 19th, 1914, inclusive. It shows a balance due from reserve agents, banks not reserve agents, sundry banks and bankers and totals.

Appellee's Exhibit No. 11 is a transcript from the books of appellant bank showing the condition of the account between that bank and the National Bank of Commerce between July 11th and September 19th, 1914, inclusive. This exhibit is not printed in the record. (See Tr. p. 85.)

The items aggregating \$12,225.00 had been discounted in the National Bank of Commerce on the guaranty of the appellant bank, and when they fell due the charge and credit referred were given and the notes were subsequently renewed and paid by the makers.

In the month of July, 1914, and after the proceeds of said bonds had been paid into the National Bank of Commerce of Seattle, appellant bank transferred from said bank to other reserve banks upwards of \$47,500.00. (Tr. p. 102.)

Between July 13 and July 28, 1914, inclusive, appellant bank transferred from the National Bank of Commerce to other reserve banks \$82,500.00. (Tr. pp. 110, 111.)

ARGUMENT.

While it is undisputed that the lowest sum in the vaults of the appellant bank at Centralia between July 12th and September 20th, 1914, was \$23,527.86, and that the lowest sum in the reserve banks of the appellant bank at no time between said dates was less than the sum of \$45,613.94, or a total of \$69,141.80, it is nevertheless insisted that the court erred in finding that the proceeds of the sale of the bonds—\$50,911.88—was ever in the actual possession of the defendant bank. The deposit by the appellant bank with itself of \$50,911.88, by giving the treasurer credit for that amount upon its books, was in absolute violation of the statute governing the deposit of public funds, and the appellant bank knew, and was bound to know as a matter of law, that the money so collected and deposited, was held by the city treasurer as a public officer in trust for the City, and that the money could not be used for any purpose other than the purchase and improvement of said system of water works.

The contention of appellants is, we submit, without merit on both reason and authority and is clearly overruled by the decisions of this court and of the Supreme Court of the United States. It has never

been successfully denied, so far as we know, that the possession of an agent is ~~not~~ the possession of the principal; and inasmuch as the National Bank of Commerce of Seattle was the agent of the appellant bank, it seems idle to argue that the proceeds of the sale of the bonds never in law or in fact passed into the possession of the appellant bank. It exercised the right of dominion, control and disposition of these funds, without limitation or restraint, and it is now argued that, notwithstanding this, it neither in fact nor in law ever had possession of the fifty thousand-odd dollars which it kited from one reserve bank to other reserve banks, in order to conduct its business and keep itself afloat.

The proceeds of the bonds collected by the appellant bank through its agent, the National Bank of Commerce, immediately upon being credited to the appellant bank, passed into its possession as fully as though the money actually had been paid over its counter.

Commercial National Bank vs. Armstrong,
148 U. S. 50.

This case is, aside from the decisions of this court, a complete answer to the contention of the appellants, for it determines two points, both of which are absolutely fatal to the position assumed

by them. This case holds, first, that if the appellant bank was indebted to its sub-agent bank, and the money when received was entered as a credit to such indebtedness, the money must be considered as reduced to possession and as having passed into the general funds of the appellant bank; second, that if such indebtedness did not exist and the moneys remained in the hands of the sub-agent bank, subsequently to be remitted to appellant and were in fact paid to the receiver after his appointment, the fund was subject to the trust created by the relationship between the banks.

In stating the facts of the case Mr. Justice Brewer said (p. 53):

“The conclusions of the circuit judge were that the relation between the two banks was that of principal and agent; a relation which continued not only while the paper was held by the Fidelity Bank, but after the money had been collected thereon; but that in order to enforce a trust in favor of the plaintiff, as to any of the moneys so collected, they must be specifically traceable. * * * This paper had substantially all passed into the hands of other banks, to whom it had been sent by the Fidelity Bank, as its sub-agents, and the circuit court judge held that if the Fidelity was indebted to these local banks, sub-agents, and the collections, when made, were entered in their books as a credit to such indebtedness, *they must be considered as reduced to possession and as having passed into the general funds of the Fidelity;*

but that, on the other hand, if the Fidelity was not indebted to the sub-agent banks, and the collections remained in their hands to be subsequently remitted to the Fidelity, and in fact were paid to the receiver after his appointment, they were specifically traceable, and were therefore subject to the trust created by the relationship between the two banks, and payment thereof could be enforced out of the funds in the hands of the receiver."

In the course of the opinion, the court (p. 53) said:

"We agree with the circuit judge that the relation created between the banks as to uncollected paper was that of principal and agent, and that the mere fact that a sub-agent of the Fidelity Bank had collected the money due on such paper was not a mingling of those collections with the general funds of the Fidelity, and did not operate to relieve them from the trust obligation created by the agency of the Fidelity, or create any difficulty in specifically tracing them. As to such paper, the transaction may be described thus: The plaintiff handed it to the Fidelity, the Fidelity handed it to a sub-agent, the sub-agent collected it and held the specific money in hand to be delivered to the Fidelity; then the failure of the Fidelity came and the specific money was handed to its receiver. That money never became a part of the general funds of the Fidelity; it was not applied by the sub-agent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it. The Fidelity received the paper as agent, and the endorsement 'for collection' was notice that its

possession was that of an agent and not of owner. * * * The plaintiff then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity. * * * Whether it be said that such funds are specifically traceable in the possession of the sub-agent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same. The Fidelity received this paper as agent. At the time of its insolvency, when its right to continue business ceased, it had not fully performed its duties as agent and collector; it had not received the moneys collected by its sub-agent. They were traceable as separate and specific funds, and therefore the plaintiff was entitled to have them paid out of the assets in the hands of the receiver, for when he collected them from these sub-agents, he was in fact collecting them as the agent of the principal. *No mere bookkeeping between the Fidelity and its sub-agent could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction."*

At the time the proceeds of the bonds were paid into the National Bank of Commerce, the appellant bank had an overdraft with the former bank in a sum in excess of \$11,000, and a sum sufficient to liquidate this indebtedness was deducted by the National Bank of Commerce from the proceeds of the bonds. It is shown by the evidence that the

appellant bank had endorsed and guaranteed the payment of promissory notes to the amount of \$12,225.00 to the National Bank of Commerce, and when these notes fell due, this bank forwarded same to the appellant bank and charged it with the amount thereof, and appellant bank thereupon gave the National Bank of Commerce a corresponding credit.

In *Commercial National Bank vs. Armstrong*, *supra*, the court in the course of its opinion further said (p. 57):

“We also agree with the circuit court in its conclusions as to those moneys collected by sub-agents to whom the Fidelity was in debt, and which collections had been credited by the sub-agents upon the debts of the Fidelity to them before its insolvency was disclosed, for *there the moneys had practically passed into the hands of the Fidelity, the collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents; it was the same as though the money had actually reached the vaults of the Fidelity.*”

So we find that more than \$23,000 of the proceeds of the sale of the water bonds under any possible theory of the case—as held by the Supreme Court in the 148 U. S., *supra*—actually passed into the vaults of the appellant bank, and that the total amount of the sale, \$50,911.88, immediately upon the

collection thereof, passed into the actual possession of the appellant bank, under the authority of said case, and that inasmuch as a sum in excess of \$69,000.00 was always either in the bank at Centralia or in its reserve banks, or both, the lower court was correct in holding that a trust should be impressed to the extent of appellee's claim.

Especially is the ruling of the lower court correct when we find that the appellant bank was required by law at all times to have on hand in lawful money of the United States an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation and of its deposits, and that to meet this requirement of the law, it was allowed to count its deposits with reserve banks as lawful money on hand.

See Sections 5191-5192 Fifth Federal Statutes Annotated, pp. 124-125, and the latter part of Section 19, p. 280, 1914, Supplemental Federal Statutes Annotated.

It would seem, therefore, to be not only unreasonable but unjust to hold that the trust fund involved in this case, while at all times counted, and allowed by law to be counted, by the appellant bank as cash on hand, for the purpose of continuing its business and inviting the deposit of trust and other

funds, did not in fact pass into the possession of the appellant bank, whether actually in its own vaults or in the vaults of its reserve banks.

While the relation of debtor and creditor could lawfully exist between the Commercial National Bank and the Fidelity Bank, in the 148 U. S., *supra*, and the money collected by the Fidelity Bank either by itself or through its sub-agents for the Commercial National Bank could lawfully become a part of the general funds of the Fidelity Bank, the relation of debtor and creditor could not lawfully exist between the city and the appellant bank; nor could the collected water funds become lawfully mingled with the general funds of the appellant bank, because the proceeds of such bonds were deposited with that bank in violation of the statutes of the State of Washington, *supra*.

In *Merchants' National Bank vs. School District Number Eight*, 94 Fed. 705, at the bottom of page 706 it is said, in speaking of the Montana statute:

“Section 1817 denounces the penalty for the violation of the statute. Under the terms of the statute, *the bank could not lawfully receive the moneys of the school district as an ordinary deposit, or mingle the same with its own funds.* The bank had knowledge of the

nature of the funds, and was chargeable with knowledge of the statute.”

In *San Diego County vs. California National Bank*, at page 62, it is said:

“But the money of the complainant was deposited by its officers, and received by the bank, not only without the knowledge of complainant, but contrary to law. To put the complainant on the same plane with the ordinary creditors, is to make the former share in a loss to which it did not voluntarily subject itself, and to give the latter a share in money which never in equity became the property of the bank.”

In *Hemrich Brewing Company vs. Kitsap County*, 45 Wash. 458, the Supreme Court of the State of Washington said:

“The city could be bound by no promise of the city treasurer to leave the money in the bank, as such promise was not authorized by law.”

See also

Moreland vs. Brown, 86 Fed. 257.

Holder vs. Western German Bank, 136 Fed. 90.

Attorney General vs. Hanchett, 4 N. W. 182-3-4.

Capital National Bank vs. Cold Water Nat. Bank, 69 N. W. (Neb.) 115.

It is urged at page 44 of appellant's brief that

the case of *Moreland vs. Brown*, 86 Fed. 257, is not in point, because the plaintiff there expressly refused to have any contractual relations with the Helena bank. In the case at bar the city treasurer knew nothing of the deposit and credit to his account, and when he learned of the fact he told the bank they would have to give a bond, which was never given. The *Moreland-Brown* case is, however, directly in point, because in the suit at bar no contractual relation of debtor and creditor did exist or could lawfully exist between the City and the Centralia bank in the absence of the bond required by law. This point has been not only directly decided against appellant's contention by this court in 94 Fed., *supra*, but in the case of *Commissioners vs. Strawn*, 157 Fed. 49, cited by appellants. At page 50 of this case it is said:

“* * * The ordinary relation of debtor and creditor did not exist between the bank and the county treasurer, because a county treasurer in Ohio is positively forbidden, except under circumstances which do not exist in this instance, to make a general deposit in any bank of taxes collected. * * * Blyth had, therefore, no authority to deposit the funds as a general deposit with the Galion Bank, and the latter was bound to know that it could not receive and mingle this fund with its general moneys. *Merchants' National Bank vs. School District Number Eight*, 94 Fed. 705; 36 C. C. A.

432. Under the settled doctrine, the bank acquired no title to the public fund and the public can recover the same so far as it can be identified or traced into property which has come into the receiver's possession. That the county treasurer and the county commissioners had knowledge of this deposit, and that it was in pursuance of a course of business pursued for several years in succession without objection, does not operate as an estoppel; for there being originally no authority to violate the positive provisions of the statute in either or all of these officials, no consent or acquiescence on their part will cure the title of the bank."

And it is submitted that no well considered case to the contrary can be found, notwithstanding appellant's instance that the relation of debtor and creditor existed between the city and the bank.

Mason, the city treasurer, delivered the 105 water bonds to the appellant bank with his draft as city treasurer drawn on Carstens & Earles, Inc., for collection. (Tr. pp. 39-49.) Accompanying these bonds and the draft, appellant bank sent the National Bank of Commerce, under date of July 10th, 1914, the following letter (omitting caption):

"National Bank of Commerce,
Seattle, Washington.

Gentlemen:—

We enclose herewith for collection, draft on Carstens & Earles, Inc., for \$50,281.88 and interest. We are sending this and also package of

bonds amounting to \$52,500.00 herewith by special messenger.

Kindly deliver said bonds, together with affidavits or certificates attached to Carstens & Earles upon payment of draft, together with interest on \$52,500.00 from May 1st to date of payment, at the rate of 6% per annum.

When paid kindly credit same to our account and advise.

Very truly yours,

J. W. DAUBNEY,
Cashier."

(Appellee's Exhibit No. 9, Tr. p. 75.)

In so far, therefore, as the rights of the City of Centralia were and are concerned, everyone dealing with said bonds knew or had notice that they were water bonds of said City and by it sold to Carstens & Earles, Inc.; that the city treasurer in drawing his draft and seeking to collect the proceeds of the bonds, was acting in a fiduciary capacity; that the money derived from the sale of the same was public funds, and that the relation of debtor and creditor could not exist with respect thereto between the City and the appellant bank unless the statute relating to the deposit of public moneys had been complied with.

If, therefore, the National Bank of Commerce could not lawfully deduct from the trust fund ap-

pellant bank's overdraft of \$11,071.64, which existed on July 11, 1914, or the \$12,225.00 which it owed the bank by reason of having guaranteed the payment of the notes, and which sums, according to the books of the banks, were deducted from the trust fund, then the account with respect to such fund was at no time between and including July 13th and September 19th, 1914, overdrawn or depleted in the National Bank of Commerce. And by adding the sum of such indebtedness, \$23,296.64 to the lowest sum of money which it is admitted was in the vaults of the Centralia bank between and including said dates, to-wit, \$23,527.86, we trace the sum of \$46,-824.50—or \$2,271.41 in excess of the claim of the City—into the possession of the Centralia bank and which passed by operation of law into the possession of the receiver; for if the Seattle bank held the fund as the agent of the Centralia bank, it held the same as the agent of the receiver upon his appointment and qualification.

In *Central National Bank of Baltimore vs. Connecticut Mutual Life Insurance Company*, 104 U. S. 54, the court, at pages 63 and 64, said (see also p. 66):

“A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor *as trustee*,

differs from other trust funds which are permanently invested in the name of trustees for the sake of being held as such. For a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly. But when against a bank account, designated as one kept by the depositor, in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation."

See also

Duncan vs. Jaudin, 15 Wall 165.

Shaw vs. Spencer, 100 Mass. 389.

If, on the other hand, the National Bank of Commerce could lawfully apply portions of such proceeds to the discharge of said overdraft of \$11,-071.64, and to the payment of said notes aggregating \$12,225.00, which produced the alleged overdraft of July 28th, 1914, if any such existed, said two sums aggregating \$23,296.64 immediately passed into the vaults of the Centralia bank under the authority of

148 U. S., *supra*, and the decree of the lower court is correct, upon either theory.

Appellants argue that because of the transfers of money from the National Bank of Commerce to other reserve banks between and inclusive of July 13th and September 19th, 1914, the funds were depleted and that appellee has therefore failed to trace the proceeds of the bond sale in the possession of either the bank or its receiver. But in advancing this argument, they overlook the important fact that there was never between the dates indicated less than \$45,613.94 in the reserve banks, nor less than \$23,527.86 actually in the vaults of the appellant bank, or a total of \$69,141.80 always on hand, and that no person other than the appellee contends *that any specific part of his money ever went into any of the reserve banks*. Whenever an overdraft existed in one reserve bank, there was a sum in excess of \$45,000 in other reserve banks, and this sum passed into the hands of the receiver upon his appointment and qualification. The money, therefore, in the reserve banks was the property of the City to the extent of its claim, not only because of the presumption that the appellant bank in liquidating its indebtedness used its own money and not the fund which it held in trust for the City, but because under

the evidence and the law, the money so held was and is the property of the City. And the fact that it transferred this fund from one reserve bank to another or other reserve banks, is of no consequence so long as we trace a sum in excess of appellee's claim at all times between the material dates in the possession of the appellant bank, whether in its own or the vaults of its reserve banks or both. It is also wholly immaterial whether the relation of debtor and creditor existed between the appellant bank and its reserve agencies, or the city treasurer, in so far as the rights of the City are concerned, for whatever that relation may have been, no right of the City could be defeated thereby.

National Bank vs. Insurance Co., 104 U. S. 54-66.

This question is put at rest in this circuit by the decisions of

National Bank vs. School District No. Eight, 94 Fed. 705, and

Moreland vs. Brown, 86 Fed. 257,

which undoubtedly lay down the correct rule of law.

It is also insisted that because this court in 94 Fed. 705 said in the course of the opinion, "The Helena bank received the money in the due course of business," that the Helena bank either received

the actual money, or that this money released securities from the Fourth National Bank of New York which actually passed into the hands of the receiver. Of course, the Helena bank received the money in due course of business, just as the appellant bank received our money, for the Boston bank was, as held by this court, the agent of the Helena bank, as fully as the National Bank of Commerce was the agent of the appellant bank; and this is exactly what this court undoubtedly had in mind when it used the above quoted words, because it is absurd to say that the possession of the agent is not the possession of the principal.

Judge Cushman, in the course of his opinion, *supra*, in examining the insistence of appellant that the foregoing case (94 Fed., *supra*) was not in point on this question, said:

“The fund collected decreed to be a trust fund amounted to \$13,056. The receiver on his appointment took possession of \$19,533 in cash and collected from other assets \$200,000. An examination of the record and briefs in that case (94 Fed.) discloses that at the time of the failure of the Merchants’ National Bank of Helena, there was to its credit in the National City Bank, its Boston correspondent, *only* \$1,077.56. It was shown that no part of the *actual money received by the National City Bank of Boston was ever received by the Merchants’ National Bank of Helena*. There was

no evidence of other deposit of it than in the ordinary course. It would probably be forwarded to New York or Chicago, on which points most of the exchange sold by the Merchants' National Bank would be drawn. Upon this state of facts it was strenuously contended by the appellant in that case that no trust could be impressed upon the funds in the receiver's hands, because the money collected in Boston was not traced to the Merchants' National Bank of Helena, but in great part to other banks, and there was no showing as to the amount of the funds in the vaults of the Merchants' Bank of Helena from the time of the collection in Boston to the receivership, nor evidence as to whether at all such times the cash in such vaults was equal or greater in amount than the collection."

The cases of *Schuyler vs. Littlefield*, 232 U. S. 710, and *In re Brown*, 193 Fed. 294, cited by appellant, have no application to the case at bar, because there the fund was wholly depleted. In the case at bar appellee's fund was never depleted, neither could it be lawfully mingled.

It would serve no useful purpose to review the numerous authorities cited by appellant, because many of them have no application to the principle involved here, in that we are not seeking in this case to trace securities which were purchased by the use of a trust fund, or dealing with cases where the fund was *wholly depleted*, or seeking a decree

against *all the assets* of the bank, such as notes, bonds, and other securities, upon the theory that our money had been applied to the purchase of such securities, as complainants sought to do in *Schuyler vs. Littlefield* and *In re Brown, supra*. Neither are we dealing with cases similar to that of *City Bank vs. Blackmore*, 75 Fed. 771, where the plaintiff bank sent a draft which it undoubtedly owned to its correspondent bank for credit, and which bank sent the same to its correspondent to be credited to its account, and which was used in payment of the indebtedness of the first and second named banks with the assent of all parties concerned.

Every material point urged against the holding of the lower court has been settled by the decision of this court in the cases of

Merchants' National Bank vs. School District Number Eight, 94 Fed. 705, and

Moreland vs. Brown, 86 Fed. 257, and authorities therein cited,

as pointed out by the district judge in the opinion, *supra*, which he rendered upon the final hearing. We have, however, in the case at bar a stronger case than the one determined in *Merchants' National Bank vs. School District Number Eight, supra*, because in the case at bar the City's money at the

time of the failure of the bank was on deposit in the bank at Centralia and its reserve banks, while in *Merchants' National Bank vs. School District Number Eight*, the money—so far as appears from the opinion of the court—was deposited by the Helena Bank in its correspondent bank only at the City of Boston.

In *Montague vs. Pacific Bank*, 81 Fed. 602, Judge Morrow in the course of the opinion said (p. 603):

“It is contended that the money remitted by complainants was placed to the account of the Pacific Bank in the National Bank of Commerce, at New York; that it was not sent directly to the Pacific Bank, *but became a part of the account between the two banks, and the identity of the deposit was lost*; and that, therefore, the complainants should be admitted to share only with the other creditors in the pro rata distribution of the assets of the bank. The National Bank of Commerce was the correspondent, in New York, of the Pacific Bank. * * *

“It is clear from this evidence that the bank had received through its agent in New York, prior to its suspension, the deposit in question for transmittal to the Puget Sound National Bank, and that it was a special deposit, made for a specific purpose, and in the nature of a bailment. All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and the other kind of de-

posit, of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker.”

In *Massey vs. Fisher*, 62 Fed. 958, at page 959, it is said:

“The bank having failed to apply the money to the note can it be recovered from the receiver? His counsel thinks not, because the bank placed the money in its vaults with other money of its own, whereby its identity was lost. Why should this wrongful act defeat the plaintiffs’ right? Nobody is injured by allowing the plaintiffs to take the amount from the deposit. The receiver and creditors stand on no higher plane than the bank, and can no more assert that it was the bank’s money than the bank could. It is true, they are entitled to all the bank’s property; but this was not its property. It is not important that the plaintiffs’ money bore no mark, and cannot be identified. It is sufficient to trace it into the bank’s vaults, and find that a sum equal to it (and presumably representing it) continuously remained there until the receiver took it. The modern rules of equity require no more.”
See also

Empire State Surety Co. vs. Carroll County,
194 Fed. 605;

Erie R. Co. vs. Dial, 140 Fed. 689;

National Bank vs. Insurance Co., 104 U. S.
54.

In *Brennan vs. Tillinghast*, 201 Fed. 609, the complainant borrowed from the First National Bank

of Ironwood \$1,000.00, and as collateral thereto, deposited with the bank 200 shares of the capital stock of a copper company. Subsequently, the complainant deposited with the bank \$1,000.00 for which he received a certificate of deposit and which, as was held by the court, was received by the cashier with the understanding at the time that it was to be used in paying Brennan's note. Thereafter the bank, without the knowledge of Brennan, sold 195 shares of the said copper company for \$3,558.75. This amount was deposited in the National Bank of Duluth to its credit. At this time the Ironwood bank was indebted to the Duluth bank, and it drew its drafts in the usual manner against the account until the credit was exhausted. On May 11, 1909, the Ironwood bank owed the Duluth bank something in excess of \$1,000.00. When on June 21, 1909, the Ironwood bank closed its doors, it had in its vaults a sum in excess of \$8,000.00, and in holding that Brennan was entitled to a preference, the court said:

“It is undisputed that the proceeds of the sale of Brennan's stock, wrongfully converted by the Ironwood Bank to its own use, constituted a trust fund, which did not lose this character when mingled with other moneys of the bank, and that Brennan was entitled to recover the amount thereof as a preferred claim, if, and to the extent that, he sustained

the burden of proof of tracing this money, either in its original shape or in a substituted form, into the moneys which came into the hands of the receiver as part of the assets of the bank. * * *

“And proof that the tort-feasor has mingled the trust funds with his own and made payments thereafter out of the common fund, is, nothing else appearing, a sufficient identification of the remainder of that fund coming into the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling as trust property, under the legal presumption that he regarded the law and neither paid out the trust fund nor invested it in other property; but kept it sacred.”

In *National Bank vs. Insurance Company*, 104 U. S. 54, it is said (p. 66):

“But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, To whom in equity does it beneficially belong? *If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.*”

So that under the ruling in the 104 U. S. and the 94 Fed. *supra* the City's money in whatever bank at the time of the failure of the appellant bank, belonged to the City whether, as contended by counsel, the mere relation of debtor and creditor

existed between the appellant bank and its reserve or correspondent banks, the only question being, was there at all times after the deposit of the City's money in the possession of the appellant bank a sum equal to or in excess of the amount of the trust fund.

Appellants, under the circumstances of this case, are in no position to contend that the money was not actually received by the appellant bank, or that it paid out the City's money instead of the bank's funds.

In *Merchants' National Bank vs. School District Number Eight, supra*, this court said:

“Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay the Helena bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of \$13,056.00 and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund, subject to disbursement only upon the order of the school district.”

See also

Widman vs. Kellogg, 133 N. W. (North Dakota) 1020,

where at page 1024 it is said:

“And why, we ask, should the bank, or the receiver standing in its stead, be heard to assert as against the rightful owner of moneys that in paying creditors of the bank it paid money that belonged to appellant and which it held in a trust capacity, instead of paying its own money? To hold that the bank may take such a position and maintain it in a court of equity, seeking to do equity, would be to permit the bank to take advantage of its own wrong, to its own benefit, and to the detriment of the innocent party it has injured.”

The rule announced in *Duel vs. Hollins, et al.*, Nos. 352 and 353, decided by the Supreme Court June 5th, 1916, we submit, requires the affirmance of the decree appealed from. In that case the Supreme Court of the United States reversed the United States Circuit Court of Appeals, which held that on the bankruptcy of a broker, a customer claiming title to a certain number of shares of stock, must either identify his certificates, or show that other certificates then on hand for a number of shares equal to or in excess of the number claimed by him were intended to be substituted by the broker for those of the customer which the broker had previously disposed of.

The Supreme Court, in holding the decision of the United States Circuit Court of Appeals erroneous, quoted from *Gorman vs. Littlefield*, 229 U. S.

19, those portions of the opinion which held as follows:

First. It is unnecessary for a customer to be able to put his finger upon the identical certificates of stock purchased for him.

Second. It was the right and duty of the broker, if he sold the certificates and used his own funds, to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner, or the application to the general estate of property which never rightfully belonged to the broker.

The Supreme Court then concluded:

“Merely because the one (certificate) actually in the box represented insufficient shares to satisfy all, is not enough to prevent the application of that rule so far as the circumstances will permit.”

If we apply the rule to the case at bar what is the result? A trust fund of the City of Centralia was placed in the bank, with the knowledge of the bank that it was a trust fund. General depositors deposited money with the bank so that their money became the money of the bank and they became its

creditors. The bank failed with enough money on hand to pay the trust fund. The receiver—who is in the same position as the bank—takes the position that the City must put its finger on the specific fund. To sustain this contention would require the court to disregard *Duel vs. Hollins*, and *Gorman vs. Littlefield, supra*, as well as the decisions of this court, and to hold that the receiver, as a representative of the bank and its general depositors, “could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner, or the application to the general estate of property which never rightfully belonged to the broker,” a claim which those cases hold no creditor has a right to assert.

The fallacy of appellant’s contention consists in placing the City of Centralia, the owner of a specific fund which never became the property of the bank, upon the same footing as a general creditor of the bank who is only asserting the right to have the property of the bank applied to the payment of the debts of the bank. The general depositors claim a lien upon the property of the bank. Appellee claims its own property, of which the bank had the custody but to which the bank had no title.

The trust fund augmented the general assets

and on equitable principles the appellee is entitled to have its claim paid out of the money that went into the hands of the receiver.

Spokane vs. Bank, 68 Fed. 982.

Beard vs. District, 88 Fed. 375.

Smith vs. Township, 150 Fed. 257.

San Diego vs. Bank, 52 Fed. 59.

Page County vs. Role, 106 N. W. (Iowa), 744.

Am. Can. Co. vs. Williams, 178 Fed. 420.

St. Louis Ry. vs. Johnson, 133 U. S. 566, 576, 578.

Western German Bank vs. Norrice, 134 Fed. 724, 726.

Appellant claims in their Fourth assignment of error that the court erred in finding that the City's claim should be paid in full, without first ascertaining what proportion, if any, of the funds of the appellant bank on hand at the time of its failure was properly applicable to the payment of the City's claim in preference to other claims.

This complaint, we submit, cannot be sustained, for on the 8th day of February, 1915, the court made its order for a preliminary injunction in the cause, and on the 10th day of February, 1915, a writ of preliminary injunction was issued out of the court and cause, requiring the receiver to hold in his

possession until the further order of the court a sum sufficient to cover the City's claim, after making allowances for the expenses of administering the estate, of the moneys then in his hands or in the possession of the receiver, to be paid to the City if it should be held upon the final hearing that it was entitled to have said money paid to it in preference to the general depositors and creditors of the appellant bank. (Tr. pp. 122-126.) The receiver, therefore, had ample opportunity to hold a fund sufficient to provide for the payment of the City's claim in full, even if he had to defer dividends to general creditors on account of our and other preferred claims. There is no contention that he was not able to comply with the order of the court, notwithstanding other preferences may be claimed. If, however, any question should arise in the future with respect to preferences between the appellee and others, that question will be determined in the proper court where all the parties in interest can be properly heard.

39 "*Cyc*" 540, 541 and note 38.

The decree of the lower court is in full accord with the decisions of this court and the decisions of the Supreme Court of the United States, and it

is, therefore, respectfully submitted that the same should be affirmed.

WILLIAM R. LEE,
City Attorney of the City of Centralia,

SAMUEL H. PILES, and

JAMES B. HOWE,

of Seattle, Washington,

Solictors for Appellee.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

12

THE UNITED STATES NATIONAL
BANK OF CENTRALIA, a Bank-
ing Association, and A. R. TITLOW,
as Receiver of Said Bank,

Appellants.

vs.

THE CITY OF CENTRALIA, a Mu-
nicipal Corporation,

Appellee.

No. 2821.

Petition for Rehearing

WM. R. LEE, City Attorney
for the City of Centralia.

SAMUEL H. PILES and
JAMES B. HOWE,
Solicitors for Appellees.

The Ivy Press, Seattle

MAR 12 1917

RECEIVED,

U. S. C.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED STATES NATIONAL
BANK OF CENTRALIA, a Bank-
ing Association, and A. R. TITLOW,
as Receiver of Said Bank,

Appellants.

vs.

THE CITY OF CENTRALIA, a Mu-
nicipal Corporation,

Appellee.

No. 2821.

Petition for Rehearing

WM. R. LEE, City Attorney
for the City of Centralia.

SAMUEL H. PILES and
JAMES B. HOWE,
Solicitors for Appellees.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED STATES NATIONAL
BANK OF CENTRALIA, a Bank-
ing Association, and A. R. TITLOW,
as Receiver of Said Bank,

Appellants.

vs.

THE CITY OF CENTRALIA, a Mu-
nicipal Corporation,

Appellee.

No. 2821.

Petition for Rehearing

Appellee prays that a rehearing be granted in
this case.

In the opinion filed this court says:

“The appellee contends, on the authority
of *Commercial National Bank vs. Armstrong*,
148 U. S. 50, that the Seattle bank could not
lawfully apply on the Centralia bank’s over-
draft as it stood on July 14, 1914, the sum of
\$11,071.64 out of the moneys received for the

appellee's bonds, for the reason that the money so received on the sale of the bonds was a trust fund and that in contemplation of law the Seattle bank has at all times held that sum as the agent of the Centralia bank. A similar contention is made as to the proceeds of three notes aggregating \$12,225, which had been guaranteed by the Centralia bank to the Seattle bank, and by the latter charged back to the former. But it does not follow from these facts that the appellee can, in the present suit, recover either of those sums. For, as we have already found, *there is nothing to show that either thereof ever came into the possession of the Centralia bank or its receiver from the Seattle bank*, or that the latter admits liability to pay the same. (Italics ours.) It should be assumed, in absence of evidence to the contrary, that the Seattle bank dealt with the proceeds of the bonds on the understanding that the Centralia bank had complied with the law and had given the statutory bond, which would legalize its possession and right of disposition of the moneys collected on the sale of the bonds."

We submit:

1. That the Seattle bank, knowing that the fund in its hands was a trust fund, could not deduct therefrom the amount which the trustee individually owed to the Seattle bank.

It is not sufficient for one dealing with a trustee to presume that the trustee has power to act in a particular manner and is acting in good faith. The

Seattle bank, knowing that the fund was a trust fund, could not rely upon a presumed authority in the Centralia bank. The Centralia bank could, without executing the bond required by law, act as a collecting agent or trustee for appellee, but before the Seattle bank could lawfully place funds collected by it, and which it knew were trust funds, to the personal credit of the Centralia bank and deduct therefrom its own claims against that bank, the Seattle bank was required to ascertain that the Centralia bank had executed the bond required by law. If the Seattle bank had investigated it would have found that such bond had not been executed and that the trust fund could not, therefore, be converted into an indebtedness from the Centralia bank to appellee. The Seattle bank did not investigate, and having notice that it was dealing with trust funds it was in law charged with knowledge of the facts which investigation would have disclosed. It saw fit to rely upon the direction of the Centralia bank to place the trust fund to its personal credit. The Centralia bank not only had no authority to give such direction, but it had no *apparent* authority to so direct. The transaction between the two banks disclosed a trust relation between the Centralia bank and appellee, which the Seattle bank knew could not be changed except

by the execution of the bond required by law. It failed to inquire whether such bond had been executed, which inquiry if made would have disclosed that the bond had not been executed and, therefore, the direction to place the trust fund to the individual credit of the Centralia bank was a violation of law and a fraud upon appellee.

In the case of *Simmons Creek Coal Co. vs. Doran*, 142 U. S. 417, 438, it was held that the purchaser of land must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to a knowledge of which anything there appearing would conduct him. So in the case at bar, the Seattle bank having the bonds in its possession, and the letter of the Centralia bank accompanying them showing the purpose for which these bonds were issued, was bound at its peril to make proper investigation.

In *Wood vs. Carpenter*, 101 U. S. 135, 141, the court quoted with approval a case therein referred to, which said:

“Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. * * *

The presumption is that if the party affected

by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably has actual knowledge of it.”

In *Simmons Creek Coal Co. vs. Doran, supra*, the Supreme Court quoted with approval the following from the West Virginia case herein cited:

“Whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of a common prudence might have apprised him.”

Whatever fairly puts a party upon inquiry is sufficient notice in equity, where the means of knowledge are at hand; and if the party, under such circumstances, omits to inquire and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained.

Cordova vs. Hood, 17 Wall. 1 (8), 21 L. Ed. 587.

Augh vs. N. W. M. L. I. Co., 92 U. S. 330 (342), 23 L. Ed. 556.

Martin vs. Webb, 110 U. S. 7, 28 L. Ed. 49.

McClure vs. Oxford Tp., 94 U. S. 429 (432), 24 L. Ed. 129.

Simmons C. C. Co. vs. Doran, 142 U. S. 417 (438), 35 L. Ed. 1062.

Wood vs. Carpenter, 101 U. S. 135 (141), 25 L. Ed. 807.

If the Seattle bank actually knew that such a state of facts existed, could there be any reasonable doubt that the amount deducted from the trust fund by the Seattle bank remained in law on hand as a trust fund, for which the Centralia bank and its receiver must account to appellee? If the Seattle bank illegally deducted from the trust fund the amount of its claim against the Centralia bank then the law regards the deduction as not made, and the receiver must hold the fund in trust just as the Centralia bank held it, and to allow the receiver to acquiesce in the deduction and consequent reduction of the general claims is in effect allowing the receiver to apply the trust fund to the payment of the general indebtedness of the bank, to the injury of the owner of the fund and to the benefit of the general claimants.

It could not be successfully contended that if at the time the receiver of the Centralia bank was appointed there was in the Seattle bank to the credit of the Centralia bank as trustee, a fund collected by the Seattle bank, the receiver of the Centralia bank could consent that such deposit should be applied by the Seattle bank to the extinguishment of an indebtedness of the Centralia bank to the Seattle bank. Such action would be using the trust fund to pay an

individual indebtedness of the Centralia bank to the injury of the beneficiary for whom it was trustee, and for the benefit of its own creditors. Is there any material difference between such action and allowing a receiver to acquiesce in an illegal deduction previously made, which if not acquiesced in would in fact result in the restoration of the trust fund?

2. If, however, the first contention should not be sustained, then we submit that the application of the trust fund by the Seattle bank to its claims against the Centralia bank was as effectual a transmission to and reception by the Centralia bank of the amount so applied as if the specific money *had* been so transmitted and received. If this proposition is correct, then as the Centralia bank at the time of such application and at all times since has had on hand an amount in excess of the sum so applied, appellee is entitled to impress the money in the hands of the receiver with a trust for the amount so deducted.

With much respect we submit that the rule declared in *Commercial National Bank vs. Armstrong*, 148 U. S. 50, has been misapplied in the case at bar.

In the opinion filed your Honors, speaking of the claims of the Seattle National Bank deducted from the proceeds of the water bonds, said:

“There is nothing to show that either there-
of ever came into the possession of the Cen-
tralia bank or its receiver from the Seattle
bank, or that the latter admits its liability to
pay the same.”

The proposition now under consideration as-
sumes that the Seattle bank is not liable *to pay to
the receiver* the amount which it deducted. It as-
sumes also that the Seattle bank was entitled to pre-
sume that the bond required by law had been exe-
cuted, and that when the Seattle bank made the col-
lection the relation of debtor and creditor existed
between the Centralia bank and the Seattle bank,
*although the relation between the Centralia bank
and appellee was that of principal and agent.*

What is the rule really established in the Arm-
strong case? Is it the rule announced by the cir-
cuit court or that announced by the supreme court?

The circuit court held:

1. That the proceeds of drafts entrusted by the Commercial bank to the Fidelity bank for col-
lection, and by the Fidelity bank to its agent, which
were collected by such agent, but the proceeds of
which were not remitted to the Fidelity bank prior

to the time the latter failed, constituted trust funds which the Commercial bank could recover as such from the receiver of the Fidelity bank who received them.

2. That similar funds collected by the agent of the Fidelity bank and credited by such agent on debts of the Fidelity bank to such agent prior to insolvency of the Fidelity bank, could not be recovered by the Commercial bank because they had passed into the general funds of the Fidelity bank and could not be traced.

The Supreme Court, in affirming the decree of the Circuit Court, agreed with that court in its conclusion, as well as in the theory upon which its conclusion rested, so far as the first proposition was concerned.

The Supreme Court also agreed with the conclusion of the Circuit Court upon the second proposition, but did not agree with it upon the ground on which the court rested its conclusion.

The Supreme Court said:

“We think, however, a more satisfactory reason is found in the fact that by the terms of the arrangement between the plaintiff and the Fidelity *the relation of debtor and creditor was created when the collections were fully made.*”

In another part of the opinion the Supreme Court also said:

“We also agree with the Circuit Court in its conclusion as to those moneys collected by sub-agents to whom the Fidelity was in debt, and which collections had been credited by the sub-agents upon the debts of the Fidelity to them before its insolvency was disclosed; for there the moneys had practically passed into the hands of the Fidelity. The collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents. It was the same as though the money had *actually reached the vaults of the Fidelity.*”

The Supreme Court further said in the same opinion:

“It was the contemplation of the parties and must be so adjudged according to the ordinary custom of banking, that these collections *were not to be placed on special deposit and held until the day for remitting.* (Italics ours.)

It is clear therefore from the opinion in the Armstrong case that if the relation of principal and agent had existed between the Commercial bank and the Fidelity bank instead of the relation being that of debtor and creditor, and if it had been shown that the Fidelity bank, at the time its agents charged against the Fidelity bank the amount of the indebtedness of the Fidelity bank to them, had had on

hand an amount equal to the sum so deducted, *the funds in the hands of the receiver would have been impressed with a trust in favor of the Commercial bank.* The only reason for denying the Commercial bank the right to impress the funds in the hands of the receiver with a trust in its favor *was because the relation of debtor and creditor existed not only between the Fidelity bank and its agents, but because such relation also existed between the Commercial bank and the Fidelity bank.*

In the case at bar, assuming for the sake of argument that the relation of debtor and creditor existed between the Centralia bank and the Seattle bank, such relation did not exist between the Centralia bank and appellee, and this the court has found.

Your Honors say:

“The Centralia bank, in permitting the proceeds of the bonds to be placed to its credit in the Seattle bank, violated the plain provisions of the law. It had no right to use the money, or to commingle it with its own funds, or to place it to its credit in another bank. *Nat. Bank vs. School District No. 8*, 94 Fed. 705; *Board of Com’rs vs. Strawn*, 157 Fed. 49. The law impresses a trust upon funds so misapplied, and to the extent that the said money or any portion thereof, either in its original or a substituted form, can be traced into the funds which came into the possession of the receiver,

the appellee is entitled to a preference over the general creditors."

The opinion in the Armstrong case says:

"The case of *Marine Bank vs. Fulton*, 69 U. S., 2 Wall. 252, is in point."

In that case Mr. Justice Miller, in delivering the opinion of the court, said: (*Italics ours*)

"The truth undoubtedly is * * * that both parties understood that when the money was collected the plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the money in its business. Thus, the defendant was *guilty of no wrong in using the money because it had become its own*. It was used by the bank in the same manner that it used the money deposited with it that day by its city customers, and the relation between the two banks was the same as that between the Chicago bank and its city depositors."

The supreme court in the Armstrong case then proceeded: (*Italics ours.*)

"That reasoning is applicable here. Bearing in mind the custom of banks, *it cannot be that the parties understood* that the collections made by the Fidelity during the intervals between the days of remitting *were to be made special deposits*, but on the contrary it is clear that *they intended* that the moneys thus received should pass into the *general funds of the bank and be used by it as other funds*, and that when the day for remitting came the remittance should be made out of such general funds."

Now, in considering the present proposition it is assumed that the relation between the Centralia bank and the Seattle bank was that of debtor and creditor. When the Seattle bank collected the proceeds of the sale of the water bonds and placed them to the credit of the Centralia bank, such proceeds as between the Centralia bank and appellee constituted a trust fund belonging to appellee. If the Seattle bank had made no deduction there would have remained in that trust fund, when the Centralia bank failed, the amount which the Seattle bank did in fact deduct. The Seattle bank did in fact deduct from the fund the amount of the overdraft and the three notes aggregating \$23,296.64, which it applied on the indebtedness of the Centralia bank to itself. At the time of such application, and until the failure of the Centralia bank, the ^{Centralia} Seattle bank had on general deposit an amount in excess of the sum which ^{was} it deducted, ^{by the Seattle bank}. The deduction by the Seattle bank from such trust fund and the application of the amount so deducted to the payment of the indebtedness of the Centralia bank, at a time when the Centralia bank had on general deposit an amount in excess of that deducted, was "not a mere matter of bookkeeping * * *. It was the same as though the money had *actually reached the vaults*" of the Centralia bank.

(*Bank vs. Armstrong, supra*). In other words, the transaction was exactly the same as though the Seattle bank had remitted the trust fund to the Centralia bank and the latter bank had paid its indebtedness to the Seattle bank by a check on itself, payable out of the funds which it held on general deposit. If the Seattle bank had remitted without deduction and the Centralia bank had paid its indebtedness to the former bank by check of the latter bank on itself at a time when the Centralia bank had on general deposit a sum equal to twice the amount which was in fact deducted by the Seattle bank, is there any doubt that the individual debt of the Centralia bank would be held in law to have been paid by it out of the funds it held on general deposit and that the remainder of such fund would represent the trust fund?

“No mere bookkeeping between the Fidelity and its sub-agents *could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction.*”

Armstrong case, page 58.

The *Armstrong* case answers this question in favor of appellee.

Your Honors have found, as the trial court found, that a state of facts exists in the case at

bar which, had they existed in the *Armstrong* case, would have caused the Supreme Court to reverse the decree of the Circuit Court, such facts found by the trial court and by this court being that under the arrangements between the Centralia bank and appellee the relation was that of principal and agent, *while in the Armstrong case it is that of debtor and creditor.*

Your Honors say in the course of your opinion that, “there is nothing to show that either thereof (the sum of the overdrafts and promissory notes) *ever came into the possession of the Centralia Bank or its receiver, from the Seattle Bank.*” (Italics ours.) And in this connection we wish to call Your Honors’ attention particularly to the fact that it is squarely held in the *Armstrong* case that when the sub-agents bank applied a portion of the funds to a discharge of the indebtedness due them from the Fidelity, such application passed the money so applied into the hands of the Fidelity *as fully as if the money had actually reached its vaults.* And it is therefore submitted that the conclusion is inevitable that appellee is entitled, upon the facts found and upon any theory of law applicable to those facts, to impress the funds in the hands of the receiver with a trust in favor of appellee to the extent of \$23,296.64 at least.

SET OFF.

Appellees alleged in the fourteenth paragraph of their bill of complaint that the Centralia bank when it failed was the owner and in the possession of certain warrants and bonds therein referred to, which the City was obligated to pay, aggregating something over \$9,000.00, and that these warrants and bonds passed into the hands of the receiver, (Record p. 11), and prayed (Record p. 15) that the bank and its receiver be required to make full disclosure of such warrants and bonds, and if upon final hearing it should be held that the City was not entitled to the relief prayed for, that the amount of such warrants and bonds, with accrued interest, be offset against the amounts owing by the bank to the City. The lower court held in its opinion, (appellee's brief, bottom page 18), and as we pointed out in said brief, that inasmuch as the amount traced by appellee into the hands of the receiver exceeded the total balance due the City, after applying the payment made by the bonding company, it was not necessary to determine whether the City would be entitled to set off any part of its claim against the warrants and bonds. Inasmuch, therefore, as the City's right of setoff was not passed upon by the lower court, for the reasons

indicated, nor considered by this court, it is submitted that in any event Your Honors should remand the case with directions to allow this point to be ruled upon in the lower court, or permit the question to be presented to and determined by Your Honors, before the case shall be finally disposed of. Otherwise the right of setoff which the City claims clearly exists, will be lost to it altogether.

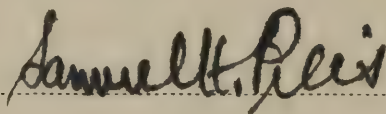
In view of the fact that appellees feel that the points presented in this petition have been passed upon and are controlled by the *Armstrong* case, it is respectfully submitted that if this petition shall be denied, Your Honors grant us a reasonable time in which to make application to the Supreme Court of the United States for a writ of certiorari.

Respectfully submitted,

WM. R. LEE, City Attorney
for the City of Centralia.

SAMUEL H. PILES and
JAMES B. HOWE,
Solicitors for Appellees.

The undersigned hereby certifies that he is one of the counsel for the petitioner, and in his judgment the foregoing petition is well founded and is not interposed for delay.

A handwritten signature in dark ink, reading "Samuel H. Peck". The signature is written in a cursive style with a large, prominent initial 'S'. The signature is positioned above a horizontal dotted line.

Of Counsel for Petitioner.

